SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 931.

MATHIAS SIMMERMAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 Pleas before the supreme court of Nebraska: At a term of the said court begun and holden at the capitol on the first Tuesday, to wit, the first day of July, anno Domini 1884—present Hon. Amasa Cobb, chief justice, Hons. Samuel Maxwell and M. B. Reese, judges—the following proceedings were had and done:

MATHIAS SIMMERMAN *vs.* THE STATE OF NEBRASKA.

Be it remembered that heretofore, to wit, on the 24th day of January, A. D. 1884, a petition in error, transcript, and bill of exceptions was filed in the office of the clerk of the supreme court in the words and figures following, to wit:

2 *Petition in Error.*

In the Supreme Court of Nebraska.

MATHIAS SIMMERMAN, Plaintiff in error,
vs.
THE STATE OF NEBRASKA, Defendant in error.

The plaintiff complains of the defendant, for that on the 25th day of October, A. D. 1883, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Kearney county, of the state of Nebraska; that said plaintiff be taken from the jail of Kearney county, state of Nebraska, on the 4th day of February, A. D. 1884, and be hung by the neck until he is dead. In an action pending in said court, wherein the defendant herein was plaintiff, and the plaintiff herein was defendant, a transcript of the proceedings containing said final judgment is herewith filed, and the plaintiff alleges that there is error in said proceedings and judgment in this:

1st. The verdict is not sustained by the evidence.

2nd. The verdict is contrary to and against the law.

3rd. The court erred in refusing to give the 2nd, 8th, 9th, 10th, 11th, 12th, and 13th instructions asked by defendant to be given by the court to said jury.

4th. The court erred in giving to said jury the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th instructions given to said jury upon the court's own motion.

5th. The court erred in excluding from evidence the certified copy of the opinion of the supreme court of Nebraska in the above-entitled case.

6th. The court erred in admitting the evidence as to the ownership and identity of certain horses that were in the possession of plaintiff's employer at the time the offense charged is alleged to have been committed.

7th. The court erred in admitting the evidence of Kit Carson as to alleged statements made to him prior to the killing of said Woods, as alleged.

8th. The court erred in overruling the motion of plaintiff, offered immediately after the State rested its case, to strike out certain evidence in said motion mentioned.

9th. The court erred in admittiug the evidence of James R. Wray, N. R. Nelson, and Frank Eldredge as aforesaid, in chief by the States all of said evidence being objected to by plaintiff at the time it was offered.

9½. The court erred in admitting the evidence of the witness, James B. Ladimus and in overruling the questions asked on cross-examination of said witness.

10th. The court erred in admitting the evidence of Chris. Larson and in overruling the questions asked by plaintiff on cross-examination.

11th. The court erred in admitting the evidence of the witness E. W. Fishbery against the several objections of plaintiff in error.

12th. The court erred in admitting the evidence of Lars Peterson and in overruling the questions of plaintiff on the cross-examination,

13th. The court erred in admitting the evidence of Charles Ericson and in overruling the questions asked by plaintiff on the cross-examination.

14th. The court erred in rejecting the evidence of George Schmidt, as offered by plaintiff, and in admitting his evidence on cross-examination.

15th. The court erred in not calling to order the district
3 attorney in his argument to the jury, which was prejudicial to the rights of plaintiff in error in calling plaintiff Jesse James and Billy the Kid.

16th. The court erred in overruling the motion for a change of venue, or for change of place of trial.

17th. The court erred in overruling the oral motions made by plaintiff, during said trial, to strike out certain evidence.

18th. The court erred in overruling the motion for a new trial.

The plaintiff therefore prays that said judgment may be reversed, and a new trial granted in said cause, and for such other relief as justice may require.

L. C. BURR,
Att'y for Plaintiff in Error.

Endorsed: Simmerman *vs.* The State. Petition in error. Filed Jan'ry 25, 1884. Guy A. Brown, clerk. L. C. Burr, att'y for pl'ff.

4 *Transcript.*

THE STATE OF NEBRASKA, *Kearney County*:

Pleas before the district court of Kearney county, Nebraska, at a term begun and holden in the county of Kearney on the 18th day of October, 1883, before William Gaslin, Jr., judge of said district court.

THE STATE OF NEBRASKA, Plaintiff,
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe, Defendant.

Be it remembered that heretofore, to wit, on the 17th day of Octo-

ber, 1882, an indictment was filed in the office of the clerk of the district court of Kearney county, in the words and figures following, to wit:

Indictment.

THE STATE OF NEBRASKA, } ss:
Kearney County, }

Of the October term of the district court of the fifth judicial district of the State of Nebraska, within and for Kearney county, in said State, in the year of our Lord one thousand eight hundred and eighty-two, the grand jurors chosen, selected, and sworn in and for the county of Kearney, in the name and by the authority of the State of Nebraska, upon their oaths present that John Doe and Richard Roe, persons whose names are to the grand jurors unknown, late of the county aforesaid, on the 16th day of October, in the year of our Lord one thousand eight hundred and eighty-two, in the county of Kearney and State of Nebraska aforesaid, intending purposely and of their deliberate and premeditated malice, and Jack Woods unlawfully and feloniously to kill and murder, in and upon the said Jack Woods, then and there being, did unlawfully, feloniously, forcibly, purposely, and of their deliberate and premeditated malice make an assault, and that the said John Doe and Richard Roe, persons whose names are to the jurors unknown, a certain pistol then and there charged with gunpowder and two leaden bullets, which said pistol they, the said John Doe and Richard Roe, persons whose names are to the jurors unknown, each in his right hand had and held then and there unlawfully, feloniously, purposely, and of their deliberate and premeditated malice, and with intent then and there the said Jack Woods to kill and murder, did discharge and shoot off to and against and upon the said Jack Woods, and that the said John Doe and Richard Roe with the leaden bullets aforesaid out of the pistol aforesaid then and there by force of the gunpowder aforesaid, by the said John Doe and Richard Roe, discharged and shot off as aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, with intent to kill and murder him, the said Jack Woods, did strike, penetrate and wound him, the said Jack Woods, in and upon the back of him, the said Jack Woods, thereby then and there purposely and of deliberate and premeditated malice giving to him, the said Jack Woods, in and upon the back of him, the said Jack Woods, one mortal wound of the length of three inches, and of the breadth of three inches, and of the depth of three inches, and in and upon the left side of him, the said Jack Woods, then and there purposely, and of deliberate and premeditated malice, giving to him the said Jack Woods, in and upon the left side of him, the said Jack Woods, one mortal wound of the length of three inches, and of the breadth of three inches, and of the depth of three inches, of which said mortal wound the said Jack Woods then and there instantly dies; and the grand jurors aforesaid, upon their oaths aforesaid, do say that the said John Doe and Richard Roe, him, the said Jack Woods, in manner, and by the means aforesaid,

unlawfully, and feloniously, purposely, and of their deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

E. G. GODFREY,
District Attorney pro tem.

The said indictment is indorsed in words and figures following, to wit:

Indorsement on the indictment: Indictment. The State of Nebraska *vs.* John Doe and Richard Roe, persons whose names are to the grand jurors unknown. Indictment for murder in the first degree. A true bill. J. W. Gilman, foreman of the grand jury. Filed October 17th, 1882. J. H. Jensen, clerk. Witnesses for the State: James B. Laddamus, Mrs. R. B. Kelley, W. W. Wood, Ben Benson, Chris. Larsen, L. B. Ribinson, Lars Peterson, Louis Barton, George Schmidt, Joseph Dickman, Charles Ericson, J. W. Hollenbeck, Thomas H. Holdsmith, James Robinson, L. R. Brown, Minnie Dodson. E. H. Godfrey, district attorney pro tem.

STATE OF NEBRASKA, }
Lancaster County, } *ss:*

I hereby certify that on November 20th, 1882, I served the within indictment on the within-named John Doe, by delivering to him a true and certified copy of the same. Fees, $1.00.

GRAN ENSIGN, *Sheriff.*
By H. A. ENSIGN, *Deputy.*

And afterwards, and on the 22nd day of October, 1883, there was filed in the office of the clerk of the said court, in and for Kearney county, a motion for change of place of trial, in words and figures following, to wit:

Motion for Change of Venue.

In the District Court of Kearney County, Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

Comes now the said defendant and moves the said court for a change of the place of the trial of this *court* for the reasons following:

1st. Because the said Mathias Simmerman cannot have a fair and impartial trial in the county of Kearney, State of Nebraska, of account of predjudice and bias of the citizens thereof.

2d. Because there was three persons supposed to have been killed at the shooting charged in the indictment, and all of their friends and relations live and reside in said Kearney county; said friends and relations are large in numbers and naturally desire the conviction of the defendant.

3d. Because it is charged all over the said State of Nebraska and alleged as a fact, and is a fact that the public feeling, bias, and preju-

dice is strongly against this defendant in said Kearney county; and if the defendant is acquitted he will be hung by a mob; that the press of the State and said county have so stated, and there is great danger that defendant will be hung by violence before or after a trial in Kearney county.

This motion is supported by affidavits, with exhibits thereto attached.

L. C. BURR,
For Def't.

Journal Entry.

THE STATE OF NEBRASKA
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe.

Indictment for murder in the first degree.

6 On this day this cause came on for hearing upon motion of the said defendant, Mathis Simmerman, indicted by the name of John Doe, for a change of venue, the said defendant being personally present in court. Upon due consideration the court overrules said motion, to which ruling the defendant excepts, and his exceptions are allowed.

THE STATE OF NEBRASKA
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe.

Indicted for murder in the first degree.

Now on this 22d day of October, 1883, this cause came on for trial, the said defendant, Mathias Simmerman, having been indicted at a former term of court, to wit, the regular October term, A. D. 1882, on the 17th day of October during said term, by the name of John Doe, for murder in the first degree, and the said defendant was arraigned. The indictment being read to him, he was asked what, for plea, he would make thereto; answered "not guilty."

On this day came the defendant, the said Mathias Simmerman, indicted by the name of John Doe, in his own proper person, before the court, accompanied by his counsel, whereupon came a jury of twelve good and lawful men, to wit, Charles De la Barr, William Blayney, E. C. Swanson, Charles Sules, S. Nelson, Charles H. Prindell, George P. Smith, D. C. Robbins, George Mallinger, A. B. Starkey, M. W. Cozier, A. C. Woodred, who were duly empaneled and sworn to well and truly try, and true deliverence make between the State of Nebraska and the prisoner at the bar, the said Mathias Simmerman, indicted by the name of John Doe. After listening to oral evidence of sundry witnesses given in open court in presence of the said Mathias Simmerman, his counsel, and the counsel for the State, the said jury were permitted to separate until convening the court to-morrow morning, after being admonished by the court that it is their duty not to converse with or suffer themselves to be ad-

dressed by any other persons on the subject of this trial, or to listen to any conversation on that subject, and that it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

Whereupon the court adjourned till to-morrow morning. Read and approved.

WILLIAM GASLIN, JR., *Judge.*

Be it remembered that on the 23rd day of October, 1883, the court met, pursuant to adjournment of yesterday.

THE STATE OF NEBRASKA, Plaintiff,
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe, Defendant.

Indictment for murder in the first degree.

In the opinion of the court, it being proper for the jury empaneled and sworn in this cause to have a view of the place and building in which the homicide for which said defendant is on trial, is alleged to have occurred, the court therefore orders the said jury to be conducted in a body, under the charge of the sheriff of this county, Charles A. Ericson, to the said place and building in which and where the said homicide is alleged to have occurred, which place and building is ordered by the court to be shown to the said jury by the said sheriff and John Grove, appointed by the court therefor, which is accordingly done; the said Mathias Simmerman, indicted by the name of John Doe, accompanying the said jury, said sheriff, and said Grove and being personally present with them at the time of the said view, and examination of said place and building, and during the entire proceedings, the said sheriff, and the said John Grove first being sworn to allow no person other than themselves to speak to the said jury on any subject connected with the trial of this case, and to faithfully, honestly,
7 and impartially discharge the duty intrusted to them in the entire premises; the said jury is also admonished by the court, prior to leaving the court-room, that during their absence therefrom, in charge of said sheriff and said Grove, they must not speak to any person or persons, or allow any persons to speak to them on any subject connected with this trial, other than to said sheriff and said John Grove, having them, the said jury, in charge.

Thereafter, and on the same day, after listening to the evidence in the case given in open court, in presence of the said Mathias Simmerman, his counsel, and counsel for the State, the said jury are allowed to separate until commencing of court to-morrow morning, after being admonished by the court that it is their duty during the entire trial not to converse with or suffer themselves to be addressed by any other persons on the subject of this trial, or to listen to any conversation on the subject thereof, and that it is their duty not to form or express an opinion thereon until this case is finally submitted to them.

And afterwards, on the 23rd day of October, 1883, the defendant

filed a motion to strike out evidence in the office of the clerk of the district court, in words and figures following, to wit:

Motion to Strike out Evidence.

In the D. C., Kearney County, Nebraska.

STATE *vs.* SIMMERMAN.

Motion to strike out evidence.

Now comes the said defendant, and moves the court here, after the State has rested its case, and before the defendant has entered into any evidence on his own behalf, to strike out and take from the jury all that part of the evidence of the witness W. R. Nelson relating to a pretended conversation with the defendant, in the fore part of October, 1882, for the reason that the same is incompetent, immaterial, and irrelevant, as was duly objected and excepted to by defendant at the time.

Also to strike out all of that part of the evidence of Frank Eldridge, as to pretended conversation of said witness with defendant in the month of May, or June, 1882.

Also to strike out all that part of the evidence of witness James Wray relating to the branding and ownership of certain horses, for the reason that said evidence is incompetent, immaterial, and irrelevant.

L. C. BURR,
For Deft.

Whereupon the court adjourned till to-morrow morning. Read and approved.

WILLIAM GASLIN, JR., *Judge.*

Be it remembered that on the 24th day of October, 1883, the court met pursuant to adjournment of yesterday.

Journal Entry.

STATE OF NEBRASKA
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe.

Indictment for murder in the first degree.

On this day came the said jury, heretofore empaneled and sworn in this case, to wit, Charles Siles, S. Nelson, Chas. H. Prindell, Charles De la Barr, William Blayney, E. C. Swanson, George P. Smith, D. C. Robins, George Mallinger, A. R. Starkey, M. W. Cozier, A. C. Woodred; also came the said defendant, the said Mathias Simmerman, in his own proper person, in court. After listening to argument of counsel, and being charged by the court, the said jury retired in charge of a sworn bailiff to deliberate upon their verdict.

On the same day, to wit, October 24th, 1883, there were filed in the office of clerk of the district court the following instructions by

the court upon its own motion, which were given to the jury before retiring to deliberate upon their verdict, in words and figures following, to wit:

Instructions by the Court upon its own Motion.

8 THE STATE OF NEBRASKA, Plaintiff,
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe, Defendant.

Indicted for murder in the first degree.

1st. To warrant you in finding the prisoner guilty of murder in the first degree, under the indictment in this case, it is incumbent upon the prosecution to satify you beyond a reasonable doubt that the prisoner now on trial in Kearney county, Nebraska, on or about October 16th, 1882, purposely and of his deliberate and premeditated malice, shot and killed Jack Woods, the person named in the indictment, with a revolver or pistol, as charged, and you must find that the killing was done without justifiable cause or excuse.

2nd. You will bear in mind you must be satisfied, from the evidence in the case, beyond a reasonable doubt, to find the accused guilty of murder in the first degree, that the defendant now on trial not only maliciously and purposely shot and killed said Jack Woods without any justifiable cause or excuse, but you must be further satisfied, and it is incumbent upon the prosecution to convince you beyond a reasonable doubt, that the accused resolved on in his mind, thought over, and meditated upon the subject of killing the said Woods, and definitely fixed in his mind the purpose of so doing prior thereto. The time of fixing the resolution or purpose to kill prior thereto is immaterial, provided sufficient time had elapsed before firing the fatal shot for the accused to deliberate upon the subject, resolve and think it over, and definitely fix in his mind the determination to kill the said Woods before doing so.

3rd. If you find the accused purposely and maliciously, in said Kearney county, on or about October 16, 1882, with a pistol or revolver, as charged, shot and killed said Woods, but entertain a reasonable doubt as to the killing being done with deliberation and premeditation, it is your duty to acquit him of murder in the first degree and find him guilty of murder in the second degree.

4th. If you find that the accused, in said Kearney county, as charged, unlawfully shot and killed said Jack Woods without malice, it is your duty to find him guilty of manslaughter, under page 664, section 5, Compiled Statutes of Nebraska, which reads as follows: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of same unlawful act, every such person shall be deemed guilty of manslaughter, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than ten years nor less than one year."

5th. If you find the accused shot and killed the said Jack Woods,

and was justified under the circumstances in doing so, or you find the defendant did not commit the homicide, it is your duty to acquit him.

6th. Malice in law is the intentional doing of an unlawful act without just cause or excuse.

7th. If you find from the evidence in the case the accused had committed a felony in this State, and the said Woods was attempting to arrest the prisoner therefor, or if you find a felony had been committed therein, and the deceased, Jack Woods, had reasonable ground to believe the accused guilty of such offense, and while attempting to arrest [and] take the defendant into custody therefor he, the accused, shot and killed the said Woods, and you further
9 find said Woods used no more force or other means than was necessary to secure the arrest and custody of the prisoner, and you further find the accused knew the said Woods was attempting to arrest and take him into custody for such offense and felony, you will be warranted in finding the prisoner guilty of such degree of unjustifiable and unlawful homicide as you think the evidence warrants, bearing in mind if the killing was unlawfully done, without malice, as explained in No. 4 of these instructions, that on or about the time alleged, in said Kearney county, as charged, you will find him guilty of manslaughter; also bearing in mind to find the accused guilty of murder in the second degree you must find, from the evidence in the case, beyond a reasonable doubt, that the accused purposely and maliciously shot and killed said Jack Woods, as charged in the indictment, without deliberation and premeditation; and to convict the prisoner of murder in the first degree you must be satisfied, from the evidence in the case, beyond a reasonable doubt, that the accused shot and killed the deceased, Jack Woods, as charged, purposely and of his deliberate and premeditated malice.

8th. If you find defendant was fired, set upon, and assaulted by said Jack Woods, and further find the accused did not know he was attempting to take him into custody to arrest him for a felony, and the prisoner used no more force than was necessary to defend and protect himself from the attack and assault of said Woods, or if you find no felony had been committed by the accused, or that a felony had not been committed, if the commissioner of which the proof was not, or if committed the said Woods did not have reasonable ground to believe the accused guilty of a felony, you will acquit the prisoner; and you will also acquit the prisoner if Woods committed an unlawful assault upon him and he used no more force than was necessary to protect and defend himself. Therefore,

9th. If you find the deceased, Jack Woods, was unlawfully shot and killed at time, place, and as charged in the indictment in this case, and you find the accused now on trial was voluntarily, personally present when the said Jack Woods was shot and killed, if you so find, and you find the prisoner did not fire the fatal shot or shots which produced the death of said Woods, but you find the accused incited, aided, assisted, encouraged, and abetted the killing of said Woods, and you further find the accused was participating

in the criminal intent and acting in concert and unison with the party who actually did the shooting and killing, you will be warranted in finding the prisoner guilty of the same crime that the actual perpetrator of the deed would be, whose physical agency actually did the shooting.

10th. All reasonable doubts and well-grounded presumptions you will resolve in favor of the prisoner.

And afterwards, on the 23rd day of October, 1883, the defendant filed the following instructions to the jury, numbered from one to fifteen inclusive, in the office of the clerk of the district court, in words and figures following, to wit:

Instructions to the Jury Asked by the Defendant Given to the Jury.

The District Court, Kearney County, Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

The court instructs the jury that in this case the law raises no presumptions against the prisoner, but every presumption of
10 law is in favor of his innocence; and in order to convict him of the crime alleged in the indictment, or of any lesser crime included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt, and if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the prisoner the benefit of such doubt and acquit him.

The jury is instructed that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty.

To warrant a conviction of the defendant he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together. In law the accused is always presumed to be innocent until his guilt is established by evidence, and to authorize a conviction such guilt must be established beyond a reasonable doubt.

The court instructs the jury that you have no right to disregard the testimony of the defendant on the ground alone that he is [the] defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case, and if from all the evidence the jury have any reasonable doubt whether at the time of the shooting complained of the defendant fired the fatal shot, you should give the prisoner the benefit of the doubt and acquit him.

The jury are instructed that it would be highly improper and wrong for them to regard the statements of the prosecuting attorney

that are not based on the evidence in the case, if any such have been made. The court further instructs the jury that the allusions and references of the prosecuting attorney to the supposed prevalence of crime in the community should in no way influence or prejudice your minds against the defendant in this case. Your duty is discharged when you have determined his guilt or innocence of the charge contained in this indictment, and there is no other question involved in the case.

Modified as follows: Provided you find the prosecution has made any statement not based in the evidence on the prevalence of crime in the community.

The court instructs the jury that a reasonable doubt within the meaning of the law is such a doubt as would cause a reasonable precedent, and considerate men in the graver and more important affairs of life to pause and hesitate before acting upon the truth of the matter charged or alleged.

The jury are instructed [that] to justify a verdict for murder in the first degree the evidence must be sufficient beyond a reasonable doubt to show that the prisoner, Simmerman, not only purposely, but that he also deliberately and with premeditated malice, fired the fatal shot which produced the death of Jack Woods. If the evidence falls short of this, and only shows the act to have been done purposely and maliciously, but without deliberation or premeditation, then your verdict cannot exceed murder in the second degree. The jury are instructed that by the term deliberation and premeditation in the statutory definition of the different degrees of homicide is the act [of] deliberating or weighing and examining
11 the reasons for and against a choice or measure with mature reflection, and the proper definition of premeditation is, first, the act of meditation beforehand—previous deliberation—and, second, previous contrivance or design formed, and the jury are instructed that the statutory rule, or deliberation and premeditation, requires the act to have been done with reflection, and considered beforehand, weighing the reasons.

The court further instructs the jury that you cannot find the defendant guilty of murder in the second degree unless you shall find from the evidence that the provocation which caused the shooting of said Woods was inconsiderable, and not of such a character as to have induced a reasonable, cautious, and prudent person to believe that he was in danger of his liberty and person; and if the jury find from the evidence that the provocation was considerable, and of such a nature and character to have induced a reasonable, cautious person to have believed that said Jack Woods was unlawfully attempting to arrest the defendant, and that the defendant had reason to believe, and did believe, from the conduct and manner of said Jack Woods, that not only his liberty, but his life and person was in danger, then the jury cannot find the defendant guilty of murder in the second degree.

If there is any one single fact proven to the satisfaction of the jury, by a preponderance of evidence, which is inconsistent with the

defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.

And if all the facts and circumstances relied upon [by] the State to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit him; and if the evidence in this case shows to you that "Dick Belmont," as he is called by the witness, shot said Woods, or if you have a reasonable doubt in your minds as to whether Belmont or the prisoner fired the shot that produced the death of Woods, then you must give the benefit of such doubt in favor of the prisoner and find him not guilty.

Modified as follows: Should you find the said Belmont, or any other person, unlawfully shot and killed said Woods, as charged, and you further find the prisoner now on trial, by virtue of previous agreement, was voluntarily personally present purporting in the crime, not intent of the said Belmont or the person who fired the fatal shot, when the shooting and killing was done, acting in concert with the person who actually did the shooting, aiding, inciting, assisting, encouraging, and abetting the party who did the killing, you will find him guilty of such degree of unjustifiable homicide as you think the evidence warrants.

Instructions Asked for by the Defendant Refused by the Court and Not Given to the Jury.

The defendant is entitled to every presumption of innocence compatible with the evidence in the case, and if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, then it is your duty to so account for it, and find the defendant not guilty.

The court instructs the jury that it is not enough that you firmly believe from the evidence that it is more probable that the defendant killed the deceased, as charged in the indictment, than it is that he did from some other cause, but you must be satisfied beyond a reasonable doubt, from all the evidence, that he is guilty as charged in the indictment, or else it is your sworn duty to find him not guilty.

12 The court instructs the jury that if there is any other reasonable hypothesis arising out of the evidence given in this case, except the one that the defendant unlawfully killed the deceased, then the defendant is entitled [to] the benefit of such hypothesis, and he ought to be acquitted.

On the subject of homicide, in resisting an unlawful attempt to arrest, the court instructs the jury that when Jack Woods attempted to arrest the prisoner Simmerman in the manner described by all the evidence, he, the said Woods, had no right or authority to do so; and if you find from the evidence that Woods so pressed Simmerman as to make it necessary for said Simmerman to choose between submission to such unlawful arrest and the killing of said Woods, then I charge you that the killing of Woods under such circumstances is not even manslaughter, and you must acquit the defendant.

The court instructs the jury that if they shall find from the evidence that the defendant fired either or both shots which caused the death of Woods, the deceased, for the killing of whom the defendant is now on trial, but fired said shot or shots while resisting an unauthorized and unlawful attempt by said "Woods" to arrest this defendant, then the jury shall not find the defendant guilty, but must acquit him.

The court further instructs the jury that unless they shall find from the evidence that the said "Woods" made known to the defendant the authority by virtue of which he proposed to arrest him, or unless they shall find from the evidence that the defendant personally knew said Woods, and that he was sheriff, and acting in the line of his aforesaid duty, then they must find that the said Woods was making an unlawful attempt to arrest the defendant, and that defendant was justified in resisting the same even to the killing of said Woods.

The court instructs the jury that the evidence in this case will not warrant or sustain a verdict of guilty of murder in the first degree, and you must find him not guilty.

The court instructs the jury that the evidence in this case will not warrant or sustain a verdict of guilty of murder in the second degree, and you must find him not guilty.

The court instructs the jury that the evidence in this case will not warrant or sustain a verdict of guilty of manslaughter, and you must acquit him.

The court instructs the jury that the evidence in this case will not warrant or sustain a verdict of guilty, and you must bring in a verdict of not guilty.

Whereupon the court adjourned till to-morrow morning; read and approved.

WILLIAM GASLIN, JR., *Judge.*

Be it remembered that the court met on this 25th day of October, 1883, pursuant to adjournment of yesterday.

Journal Entry.

THE STATE OF NEBRASKA
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe.

Indictment for murder in the first degree.

On this day came the said jury, heretofore empaneled and sworn in this case, to wit: Charles De La Barr, William Blayney, E. C. Swanson, Charles Siles, S. Nelson, Charles H. Prindle, George F. Smith, D. C. Robins, George Malinger, A. R. Starkey, M. W. Cozier, A. C. Woodred, in custody of the sworn bailiff, having them in charge during their deliberation, and in presence of the said Mathias Simmerman, being personally present in court, attended by
13 his counsel, and returned and rendered their verdict in words and figures following, to wit:

Verdict.

October term, A. D. 1883, to wit, October 25th, 1883.

THE STATE OF NEBRASKA
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe.

THE STATE OF NEBRASKA, } ss:
Kearney County, }

We, the jury in this case, duly empaneled and sworn, do find and say that we find the said defendant, Mathias Simmerman, guilty of murder in the first degree.

A. B. STARKEY,
Foreman.

Whereupon the said defendant, Mathias Simmerman, being personally present in court, made his motion to set aside the verdict of the jury and grant a new trial, which was overruled by the court and excepted to by the defendant, and thirty days is granted to reduce bill of exceptions to writing.

Motion for New Trial.

In the District Court held in and for Kearney county, State of Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

Motion.

Comes now the defendant and moves the court here for a new trial of this cause for the following reasons:

1. The verdict is not sustained by the evidence.
2. The verdict is contrary to law.
3. The court erred in refusing to give the 2d, 8th, 9th, 10th, 11th, 12th, and 13th instructions asked by the defendant.
4. The court erred in giving the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th instructions, given of his own motion.
5. The court erred in not giving an instruction to the jury reciting the statutory definition of murder in the different degrees.
6. The court erred in excluding the certified copy of the opinion of the supreme court of Nebraska in the above-entitled case.
7. The court erred in admitting testimony as to the ownership and identity of certain horses that were in possession of defendants, employed at the time the offense charged is alleged to have been committed.
8. The court erred in admitting the testimony of one Kit Carson as to alleged statements made to him by defendant prior to the killing of the said Woods, as alleged.
9. The court erred in overruling the motion of defendant, offered immediately after the State had rested, to strike out evidence.
10. The court erred in admitting the testimony of James P. Wray,

W. R. Nelson, and Frank Eldridge, as offered in chief by the State, all said testimony having been objected to by defendant at the time it was offered.

11. The court erred in admitting evidence of the witness James B. Landamus and in overruling the questions asked in cross-examination of said witness.

12. The court erred in admitting the evidence of Chris. Larson and in overruling the questions asked by defendant on cross-examination.

13. The court erred in admitting the evidence of witness E. W. Fasbury against the objection of defendant.

14. The court erred in admitting the evidence of Lats. Peterson and in overruling the questions of defendant on cross-examination.

14 15. The court erred in admitting the evidence of Charles Erickson and in overruling the questions asked by defendant in cross-examination.

16. The court erred in refusing and rejecting the evidence of George Schmidt and in admitting evidence on his cross-examination.

17. The court erred in rejecting the evidence of Thomas Cortney and in admitting evidence on his cross-examination.

18. The court erred in rejecting the evidence of the defendant and in admitting evidence on his cross-examination.

19. The court erred in not calling to order the district attorney in his argument to the jury, which was prejudicial to the right of the defendant.

20. Because there was misconduct of the district attorney, as shown by affidavits on file.

21. Because the court erred in overruling the motion of defendant for a change of place of trial.

22. Because the court erred in overruling the oral motions made during the examination of the several witnesses to strike out the evidence.

L. C. BURR,
Att'y for Defendant.

And on the same day, to wit, October 25th, 1883, defendant filed in the office of the clerk of the district court the following affidavits, in words and figures following, to wit:

Affidavits of L. C. Burr and A. F. Parsons.

In the Dist. Court, Kearney County, Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

THE STATE OF NEBRASKA, } *ss:*
Kearney County, }

L. C. Burr and A. F. Parsons, being first each severally sworn upon their oaths, depose and say: That they were attorneys for the defendant in trial of above-entitled action; that W. S. Morland,

prosecuting attorney, made use of the following language in his argument to the jury, in speaking of the defendant as a "Billy, the Kid, or Jesse James sort of a cow-boy;" and that the said prosecutor, while addressing the jury, in speaking of defendant's testimony and its apparent consistency, further said that said defendant had had a whole year to concoct his story; that said prosecution used said language in presence of the jury for the purpose of influencing said jury against said defendant, as affiants verily believe.

L. C. BURR.
A. F. PARSONS.

Subscribed in my presence and sworn to before me, this 24th day of October, A. D. 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

Affidavit of L. C. Burr and Joel Hull.

In the District Court, Kearney County, Nebraska.

STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

STATE OF NEBRASKA, } *ss:*
Kearney County, }

L. C. Burr and Joel Hull, being first severally sworn on their several oaths, say: That they were attorneys for the defendant in trial of this action; that on the argument to the jury of this action W. S. Morlan, prosecuting attorney, made use of the following words: "That the attorneys for the defense had had the advantage of a whole year to concoct a scheme and story for Simmerman to tell to the jury." L. C. Burr immediately requested the court to require the district attorney to confine his remarks to the evidence in this case. The court refused so to do.

The district attorney then repeated the above statement to the jury in nearly the same language. Burr called the attention of the court again to the words. The court answered and said: I hear him. Burr then said he excepts to the remarks, and the district attorney then remarked: You may put it in the record if you want to. Burr said: I will be compelled, but I do not like to. The district attorney then repeated said statement, and did repeat it in all
15 three several times, against the objection of Burr, all of said statements to the effect that attorneys for Simmerman had had a whole year's time to concoct a scheme for the defendants to tell the jury.

Affiants say that this language was calculated to influence the jury against the defendant, as they verily believe.

L. C. BURR.
JOEL HULL.

Subscribed in my presence and sworn to before me this 24th day of October, 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

Journal Entry.

THE STATE OF NEBRASKA
vs.
MATHIAS SIMMERMAN, Indicted by the name of John Doe.

Indicted for murder in the first degree.

On this day came the said Mathias Simmerman, in his own proper person, before the court, attended by his counsel, and being informed by the court of the verdict of the jury, and being asked by the court whether he had anything to say why judgment should not be pronounced against him, responded that he had nothing to say.

It is therefore considered and adjudged by the court that the said Mathias Simmerman be taken hence and confined in the common jail of Kearney county, Nebraska, until February 4th, 1884, and that on said 4th day of February, 1884, he (the said Mathias Simmerman) be taken hence, and between the hours of 12 m. and 1 p. m. of said 4th day of February, 1884, he (the said Mathias Simmerman) be hung by the neck until he is dead.

WILLIAM GASLIN, *Judge.*

THE STATE OF NEBRASKA, *Kearney County:*

I, J. H. Jensen, clerk of district court of Kearney county, do hereby certify that the above and foregoing is a true and perfect transcript of the records in the above-entitled cause as the same are on file and of record in my office.

In testimony whereof I have hereunto set my hand and seal of said court this 26th day of November, A. D. 1883.

J. H. JENSEN, *Clerk.*

Fees, transcript, $15.

Endorsed as follows: Mathias Simmerman *v.* The State of Nebraska. Transcript. Supreme court of Nebraska. Filed Jan. 24th, 1884. Guy A. L. Brown, clerk.

Transcript of Oral Evidence and All Affidavits and Other Evidence Used on the Trial of this Case.

In the District Court of Kearney County, in the State of Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

Received this portion extended notes only of my proposed bill by express Friday afternoon, Nov. 23d, 1883. All affidavits used on motion for new trial not yet furnished me by clerk of court.

L. C. BURR.

NOV. 29TH, 1883.

Received copies of affidavits from clerk of court on Nov. 29th, 1883, from post office at about 4 o'clock p. m.

L. C. BURR.

ARAPAHOE, NEBRASKA, *November 30th*, 1883.

Received the within proposed bill of exceptions from L. C. Burr, attorney for Mathias Simmerman, the following from pages 1 to 137, inclusive, taking all the evidence and affidavits offered or
16 given by either party on the trial of this cause.

W. S. MORLAN,
District Attorney.

ARAPAHOE, NEBRASKA, *December* 1, 1883.

I have examined the within proposed bill of exceptions and return the same; have no suggestions or amendments to make; the following, from pages 1 to 137, inclusive, containing all the evidence of every kind offered or given by either party on the trial of said cause.

W. S. MORLAN,
District Attorney.

17 *Oral Evidence.*

In the District Court of Kearney County, Eighth Judicial District, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
vs.
MATHIAS SIMMERMAN, Defendant.

Indictment for murder in the first degree.

Regular October term for 1883.

Hon. William Gaslin, judge, presiding.

Trial commenced Monday, October 22nd, 1883, and case given to the jury Wednesday, October 24th, 1883.

W. S. Morlan, district attorney, and W. J. M. Stewart, Esq., counsel for plaintiff.

L. C. Burr, Esq., and A. Parsons, counsel for defendant.

Jury: Charles De La Barr, E. C. Swanson, S. Nelson, George T. Smith, George Mellinger, M. W. Cozier, William Blaney, Charles Siles, Charles H. Prindle, D. C. Robbins, A. B. Starkey, A. C. Woodard.

Evidence for Plaintiff.

JAMES T. WRAY, called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you reside?
A. At Culbertson, Hitchcock county, Nebraska.
Q. Engaged in what business?
A. Stock business.
Q. Were you acquainted with Jack Woods?
A. Yes, sir.
Q. What official position did he occupy in 1882?

Defense object as not the best evidence.

Q. State if you know who exercised the office of sheriff of Hitchcock county from the first of January, 1882, up to the 16th of October, 1882.

Defense object as incompetent. Overruled. Defense excepts.

A. Jack Woods; he was sheriff of Hitchcock county during 1882 up to the time he was killed.

Q. State your acquaintance with him.

A. I had been acquainted with him since 1878.

Q. Where did he reside?

A. At Culbertson, Hitchcock county, Nebraska.

Q. Were you the owner of some horses in 1882?

A. Yes, sir.

Q. Did you have any horses stolen from you during that year? and, if so, state about the time.

Defense object as immaterial and incompetent. Overruled. Defense except.

A. Well, I got a letter.

Q. No, just state whether there were any stolen.

A. That is a pretty hard question to answer, but I think I had some stolen.

Q. State if you lost any horses; and, if so, how many.

A. Yes, sir; about 35 head.

Q. Where did you find those horses?

Defense object as immaterial and incompetent. Overruled. Defense except.

A. I found some of them here in Minden, over in Mr. Kent's corral, 16 or 17 of them.

Q. Were those your horses?

A. Yes, sir.

Q. Had you ever sold them?

A. No, sir.

18 Q. Ever given anybody the right to bring them to this county?

A. No, sir.

Q. What did you do with those horses after finding them here in Minden?

Defense object as immaterial and incompetent. Overruled. Defense except.

A. I took them back home to Culbertson.

Q. State who on the way back you met.

Defense object as immaterial, irrelevant, and incompetent. Overruled. Defense except.

A. I met several persons—I could not state all their names—Mr. Nelson was one; I met him about six miles east of Culbertson, at Willow Grove; I had the same horses that I got here and some more I had picked up going back.

Q. Describe those horses of yours as to the brand.

Defense object as immaterial and incompetent. Overruled. Defense except.

A. They were branded with what we call a lazy L on the left hip; the L was lying down, forming what we call a lazy L; that was my road brand in 1882.

Q. After you found the horses were stolen, did you communicate this fact to Jack Woods in any way, or state if they were in fact stolen?

Defense object as incompetent. Overruled. Defense except.

A. I had every reason to believe they were stolen, because I had never authorized any one to take them, and I found they were certainly gone.

Defense move to strike out the answer as incompetent and not responsive to the question. Overruled. Defense except.

Q. State whether you ever employed Jack Woods to hunt for those horses.

Defense object as incompetent. Overruled. Defense except.

A. I telegraphed Jack Woods to look out for them, as they were stolen.

Q. These telegrams—have you ever been to the office where you sent them to get them?

A. Yes, sir; I went to Kearney; Hastings was the last place I sent from; I did not go there.

Q. State if those telegrams are in existence.

Defense object as incompetent. Overruled. Defense except.

A. I went to the office and called for them and they said they were destroyed.

Q. State what you telegraphed Jack Woods.

Defense object as immaterial, irrelevant, and incompetent.

By Mr. BURR to the witness:

Q. Please tell the jury where you sent the first telegram.
A. I sent it from Culbertson to Kearney.
Q. To what office did you go for that telegram?
A. I went to Kearney.
Q. Did you examine in the office at Culbertson?
A. No, sir.
Q. Have you searched there?
A. No, sir.
Q. Did you search in the office at Kearney?
A. No, sir; only by inquiry.
Q. Who did you inquire of?
A. Mr. Bicknell, the station agent.
Q. Is he a telegraph operator?
A. Yes, sir; he is a telegraph operator, but I didn't know whether he received that message or not.

Q. Did you inquire for the operator that received your telegram?
A. No, sir.
Q. Did you send two telegrams?
A. I think so.
19 Q. Where did you send the second one from?
A. I sent one from Hastings.
Q. Where did you inquire for that one?
A. At Kearney.
Q. Anywhere else?
A. No, sir.
Q. Did you send any other?
A. I sent two from Hastings to Kearney.
Q. Have you made search in Hastings?
A. No, sir.
Q. All you have done is to inquire of the station agent in Kearney?
A. Yes, sir.

Defense here object to any evidence concerning the contents of the telegrams as incompetent. Sustained.

Q. Did you about that time receive a telegram from Jack Woods?
A. Yes, sir; I did in Hastings.
Q. What did you do with that?
A. I don't know; I never kept it; I did not think anything about keeping it; one of those telegrams I sent was in answer to one Jack sent me at Hastings.
Q. Have you got any of those telegrams?
A. No, sir.
Q. Can you get them?
A. No, sir; the copies I had were destroyed; I never keep telegrams that I get, a great while, anyway.
Q. What was the contents of the telegram you received from Jack Woods?

Defense object as incompetent. Sustained. Plaintiff excepts.

Q. When was the last time you saw the body of Jack Woods?
A. Over at Kearney, on the 17th or 18th of October, 1882.
Q. Was he dead or alive then?
A. He was dead; they shipped his body there.

Cross-examination by Mr. BURR:

Q. Did you state where your brand was?
A. Yes, sir.
Q. Where?
A. On the hip or thigh; very few had it on the shoulder.
Q. Which hip?
A. The left hip; I think only one or two had it on the shoulder.
Q. Is that what you call a trail brand?
A. Well, a road brand.
Q. Did they have any ranch brand?
A. Yes, sir; some had what they call C. A.; there were 25 or 30 ranch brands; they were Spanish brands, and it takes a better man than I am to describe them.

By Mr. MORLAN to witness:

Q. About what time did you have those horses stolen?

Defense object as immaterial and incompetent. Overruled. Defense except.

A. About the 26th or the 27th of September, 1882.

W. R. NELSON, called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you reside?
A. In Hitchcock county; in the western part of the county.
Q. I what business are you engaged?
A. Raising stock.
Q. Look upon the defendant here, Mathias Simmerman, and state if you ever saw him before. (Witness looks at the defendant, Simmerman.)
[A.] Yes, sir.
Q. State when and where you saw him?
A. In the fore part of October a year ago.
Q. In October, 1882?
A. Yes, sir.
Q. Where did you see Mathias Simmerman then?

Defense object as irrelevant and incompetent. Overruled. Defense except.

A. He and three others, who were about as rough looking fellows as he was, drove a bunch of horses into my pens on my ranch; I saw them when they were driving them in and started down there, but by the time I got there they had them in and one of the horses caught; they put a saddle on that one.

20 Q. State whether they had any horses with them.

Defense object as immaterial and incompetent. Overruled. Defense except.

A. They had about 30 to 35 head.
Q. What brand did they have?
A. The only brand I recognized was a road brand, which was a "lazy L."
Q. Did you have any conversation with defendant Simmerman there?
A. Yes, sir.
Q. State what he said there.

Defense object as immaterial, irrelevant, and incompetent. Overruled. Defense except.

A. He said he owned a part of the horses they had there, and that he had a race horse there.
Q. State whether he stated as to where they got them.

Defense object as immaterial and irrelevant. Overruled. Defense except.

A. He said they got them in New Mexico.
Q. State if you ever saw Simmerman after that time.
A. Yes, sir.
Q. Where did you see him next?
A. Down about 5 or 6 miles east of Indianola.
Q. State what he had with him then.

Defense object as immaterial. Overruled. Defense except.

A. The same three fellows were with him, and they had the same bunch of horses that were there in my pens a few days before.
Q. About what time were they up at your place?
A. About the 4th or 5th of October, 1882.
Q. State where you next saw those horses and when.
A. The next time I saw them I met Mr. Wray driving them home at Willow Grove, about six miles east of Culbertson.
Q. State what horses Mr. Wray had with him then.

Defense object as immaterial and irrelevant. Overruled. Defense except.

A. He had a bunch of the same horses that those fellows had in my pens, but not so many; they were some of the same horses.
Q. That was the same Mr. Wray that testified here just before you?
A. Yes, sir.
Q. About what time was it that you saw Mr. Wray driving those horses home?
A. About the 18th or 19th or 20th of the month; it was quite a number of days after I first saw the horses.
Q. In what month?
A. October, 1882.
Q. Where is your corral in which they put the horses when you first saw them?
A. In Hitchcock county, State of Nebraska.

FRANK ELDRIDGE, called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you reside?
A. In Hitchcock county, Nebraska.
Q. What is your business?
A. I keep a few cattle; I am a laboring man.
Q. Have you ever seen this defendant, Mathias Simmerman, before?
A. Yes, sir.
Q. When?
A. I saw him last week, and before that, in Hitchcock county, Nebraska, at Culbertson.
Q. When did you see him at Culbertson?
A. A year ago last summer.
Q. Did you have a conversation with him there?
A. Yes, sir.

Q. In regard to Jack Woods?

A. Yes, sir.

Q. State what the defendant Simmerman said there, or state the conversation.

Defense objects as irrelevant and incompetent. Overruled. Defense except.

A. I had been into the hotel there and had my dinner, and
21 was sitting out on the porch in front of the hotel, and some persons came out and asked who was sheriff of the county.

Q. Who asked that question?

A. Simmerman, this man here; he asked that question, and some one that stood there pointed to me and I said "Jack Woods is sheriff of this county;" Simmerman said "He is an Englishman, and a great foot racer;" I said yes; he said "I knew him in Texas; I know him like a book."

Q. Did you know Jack Woods personally?

A. Yes, sir; I knew him well.

Q. State what kind of a man Jack woods was physically; was he a foot racer?

A. Yes, sir; he could run well; there were very few that could outrun him.

Q. When did that conversation take place?

A. A year ago last summer, in 1882.

Q. Where was it?

A. In Culbertson, Hitchcock county, Nebraska.

Cross-examination by Mr. BURR:

Q. How many men were there?

A. There were two of them.

Q. What kind of looking men?

A. One was small with quite long black hair, a very rough looking man; the other was a little larger than he was; both were looking greasy and dirty.

Q. What was the complexion of the other?

A. He was not so dark as this one here.

Q. Was he the larger man?

A. Yes, sir; they looked pretty greasy.

Q. Which one first spoke?

A. This man here, Simmerman.

Q. What did he say?

A. He asked another man that stood there who was sheriff of the county, and the man pointed me out, and I said "Jack Woods is sheriff of this county;" he said "what Jack Woods is that; is that the little Englishman who is a good foot racer?" I said yes; then he said "I knew him in Texas; I know him like a book."

Q. How long have you lived in Hitchcock county?

A. Nearly five years; I have a few cattle, and am a blacksmith by trade.

Q. You swear to this jury that this defendant here is the same person that you talked with there?

A. He is the same man; he was a lame person, club-footed; this is the identical man.
Q. You are positive of it?
A. Yes, sir.
Q. When was it?
A. Either in May or June, 1882.
Q. Was Jack Woods in town?
A. No, sir; he was away then.
Q. How many horses did they have then?
A. Two or three.
Q. Did they have the "lazy L" brand on them?
A. No, sir; I did not see it.
Q. There were two men present?
A. Yes, sir.
Q. Did they give their names?
A. This one did; I think he said it was Mark Simmerman; I asked him his name—I did not ask the other man's name; I think the other man said he knew Jack Woods in Texas, too.

MINNIE DODSON, called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you live?
A. Twenty miles northeast of Kearney.
Q. Where were you on the 15th of October, 1882?
A. I was here in Minden, in Kearney county.
Q. State whether at that time you saw the defendant here, Matt Simmerman.
A. Yes, sir.
Q. State where you saw him.
A. I saw him at the Commercial hotel, in this town, in the dining-room.
Q. State whether the defendant here made any remarks there about being arrested.
A. He did at the supper table; they were in at the table eating their supper; they were blackguarding and talking noisy, and my husband came in and attended to them; then they talked be-
22 tween themselves, not quite so loud; I was brushing off the other table, and I heard some words that I thought were not right, and I listened to it; Simmerman to Belmont: "You know what we are looking for and what we must do; you want to keep your eyes skinned, and the first damned son of a bitch that walks up to arrest you shoot him like a dog; don't let him get the drop on you."
Q. What arms did they have?
A. Each had a six-shooter; they were lying on their laps; they sat nearly facing each other, so one could look into the kitchen and the other into the dining-room; they sat on the south side of the table.
Q. Where was that?

A. In Minden, Kearney county, Nebraska, in the Commercial Hotel.

Q. When was it?

A. On the 15th of October, 1882.

Cross-examination by Mr. BURR:

Q. Where was that?

A. In the dining-room at the Commercial Hotel, at the supper table.

Q. Where is that?

A. In Minden, nearly south of the court-house here.

Q. What direction is that from the Prairie Home?

A. South and west.

Q. When did that take place?

A. On the 15th of October, 1882, at the supper table.

Q. You were a witness before in this case?

A. Yes, sir.

Q. Did you testify to all the facts then?

A. Yes, sir; just as I have to-night.

Q. You don't wish to change your testimony you swore to before?

A. Not at all.

Q. State if you used any such words in your former testimony as these: Don't let them get the drop on you?

A. I think I must have said it.

Q. When were you a witness before?

A. It was at the other term of court.

Q. That was nearly a year ago?

A. Yes, sir.

Q. What you testified to then was your best recollection?

A. Yes, sir; to the best of my knowledge.

Q. Did you swear to anything about their having revolvers before?

A. I was not asked the question before.

Q. How did they carry their revolvers?

A. They carried them as they came in, fastened to a belt.

Q. In plain sight?

[A.] No, sir; but they had on short coats and I could see them very plain.

Q. Do you say they had six-shooters?

A. I don't know what kind they had, but they had revolvers I know.

Q. What kind of handle did Belmont's revolver have?

A. Simmerman had a pearl-handled revolver; I did not notice the other one.

Q. You are certain that Simmerman had a pearl-handled one?

A. Yes, sir.

Q. You are as sure of that as you are that you testified last term of the court to the words: Don't let them get the drop on you?

A. Yes, sir. I know he said that.

JOHN ANDERSON, called and sworn.

Questioned by Mr. MORLAN:

Q. Give your age and place of residence.
A. I am 40 years old, and reside in this place, Minden.
Q. State if you ever saw this defendant before, and if so when?
A. Yes, sir; I saw him a year ago in October, the 15th I think, the first time.
Q. State what arms, if any, he had on him then.
A. I don't know as I noticed any on the 15th.
23 Q. Did you have any conversation with him on the 15th?
A. No, sir; but I did on the 16th.
Q. State any conversation in which he said anything like threats against any party or parties in this town, some time in the afternoon of the 16th of October, 1882.
A. He rode a pony to the stable where I was and got off and let it go into the stable and remarked that this was a damned high-toned little town, but he thought a couple of them could clean it out.

Defense here move to strike out the answer of the witness as immaterial, irrelevant, incompetent, and not responsive to the question. Overruled, defense except.

Q. How was Simmerman armed at that time?
A. He had two revolvers and one knife any way, because he showed it to me; he had one revolver in his belt and the other inside the waist-band of his pants.
Q. Who was with him at that time?
A. There were three other men with him.
Q. Who were they?
A. I don't know.

The court here renews its admonition to the jury in the language of the statute, before separating, and adjourns until half-past eight o'clock to-morrow morning (Tuesday.)

TUESDAY MORNING, 8:30 O'CLOCK, *October* 23*d*, 1883.

The district attorney here makes his motion to the court, that the jury be taken to the place where the homicide occurred to view the premises, the jury to be taken there with the prisoner. The court appoints John Grom to go with the sheriff to show the premises to said jury and is duly sworn, as also the sheriff, by the court; and the sheriff, with the prisoner in charge, conducts the jury, accompanied by said John Grom, to the place where the homicide occurred. In about half an hour they return to the court-room and the trial proceeds.

JAMES P. LADIMUS, called and sworn:

Questioned by Mr. MORLAN:

Q. Where do you reside?
A. I reside now in Newark, in Kearney county.
Q. How long have you lived in Kearney county?
A. Eleven years last August.

Q. Where were you on the evening of the 16th of October, 1882?
A. I was eating supper in the Prairie Home, in Minden, Kearney county, Nebraska.
Q. At that time and place did you see this defendant, Mathias Simmerman?
A. Yes, sir.
Q. What time did you see him that evening?
A. Well, we were eating supper; they had just lit the lamps; it was between daylight and dark; he just came in and stood behind the chairs and waited for some vacant place; a man got up at my side and Belmont sat down by the side of me, and Simmerman sat side of him; I sat on the west side of them in a straight line; I sat at the northwest corner of the table; Belmont sat close to me, and Simmerman sat next east of him.
Q. Did they have any arms?
A. I did not see any as they came in, but as they sat down each took out a revolver and laid it across his lap; the next thing I saw Mr. Kelly and his wife got up and left; I sat there; Jack Woods came in and up between them and put a revolver at Simmerman and told him to hold up his hands and he did, and Belmont caught Sheriff Woods by the arm and fired under his own arm; I jumped up and backed over my chair towards the wall.
Q. Did you see Simmerman have a revolver in his hand at all?
A. No, sir.
24 Q. Did you see him shoot?
A. No, sir; I was watching Belmont.
Q. How many shots were fired?
A. Four shots.
Q. Who fired them?
A. Belmont fired two in the room and somebody else fired two; the first shot was fired by Belmont.
Q. State whether that hit Woods.
A. No, sir; he fired under his arm and missed Woods; if it had hit him it would have hit him right in front.
Q. Did you see Jack Woods after that?
A. Yes, sir; Belmont dragged him, holding him by the wrist, out over Kelly as he lay there; the last time I saw Jack Woods was in the court-house and he was then dead.
Q. Where did that shooting take place?
A. In Minden, Kearney county, Nebraska.
Q. On what date was it?
A. On the 16th of November, I believe it was.
Q. In what year?
A. In 1882.
Q. Who else was there?
A. I knew about five—Benson, Burns; Mr. Kelly and wife had just left; Dr. Hollenbect and the landlord.
Q. What was going on in town then?
A. Court was in session and that was my business here.
Q. It was at the Prairie Home where the shooting took place?
A. Yes, sir.

Q. After the shooting in the room did you see either Simmerman or Belmont?

A. No, sir; they had left before I went out.

Q. Where did you stand during the shooting?

A. Right against the door in the north side of the room; it was the wash-room door.

Q. Did you stand there during all the shooting?

A. As soon as I could get off my chair and get there.

Cross-examination by Mr. BURR:

Q. Will you give this date again—that is, the date of the shooting?

A. It was the 16th of October, I believe; it was when court set, I know.

Q. You said November before.

A. Well, October was the month, I believe.

Q. Where were you about noon on that day?

A. I ate my dinner at the Commercial Hotel in this town.

Q. Where did you eat your supper?

A. At the Prairie Home.

Q. What time did you get into the Prairie Home?

A. Six o'clock or ten minutes past.

Q. Was it dark?

A. They were just lighting the lamps.

Q. How many lamps were in the room?

A. I believe there were two on the table; there was a side table, I don't know whether there was a light on that or not; it was in the northeast corner of the room, where they went into the next room.

Q. Was there a lamp on that table?

A. I can't say.

Q. All the lamps you remember were the two on the large table?

A. Yes, sir.

Q. Who was in the room as you went in?

A. I thing no one then; Mr. Kelly and his wife went in with me; I was telling them that I did not get very good fare at the other hotel.

Q. Mr. Kelly was deputy sheriff?

A. I don't know; he used to be sheriff.

Q. His full name was what?

A. Reuben B. Kelly.

Q. Had you seen Simmerman before that?

A. I had seen him at the Commercial Hotel for dinner.

Q. That Commercial Hotel is 5 or 600 feet from the Prairie Home?

A. I don't know; perhaps so.

Q. And across the street?

A. Yes, sir.

Q. Describe to the jury what kind of a looking man Simmerman was on that day?

A. He looked pretty dark; he looked rather rough; he walked limpy, just enough to be easily noticed.

Q. Was he a large man?

A. No, sir; small.

Q. How much would he weigh?
A. I should say pretty near as much as I would then; I should say 140 pounds.
Q. How tall a man?
A. About 5 feet and 4 or 6 inches.
Q. What kind of a man was Belmont?
A. He was a smart-looking young man, light complected.
Q. How large?
A. About 5 feet 7 or 8 inches in height; would weigh 175 or 80 pounds.
Q. How long had you been in the Prairie Home before they came in?
A. I suppose ten minutes.
Q. What did they do first?
A. They stood behind us until the people that were next to me got up.
Q. Did they go into the wash-room and wash?
A. No, sir.
Q. Did you?
A. No, sir.
Q. Or Mr. Kelly and wife?
A. No, sir.
Q. Well, what did they do?
A. I stated they stood there until some chairs were vacated, when they sat down to the table.
Q. How long did they have to wait?
A. Not over 5 minutes.
Q. Then what?
A. They sat down; Belmont sat beside me, and Simmerman side of him, on the east side of him.
Q. Where is the Prairie Home?
A. Across the street; nearly east of the court-house.
Q. How large a room is that dining-room there?
A. It is about ten or twelve by fourteen feet.
Q. Is there a door leading from the sidewalk right into the room?
A. Yes, sir.
Q. Any windows?
A. There is one, facing west.
Q. And out onto the sidewalk?
A. Yes, sir.
Q. Is there any room leading from that dining room?
A. Yes, sir; one to the north; the wash-room.
Q. Was there not a bed in there?
A. Yes, sir; but a curtain separated it, making a bed-room of the east end of the room.
Q. And in the west end was the wash-room?
A. Yes, sir.
Q. Were there any windows from that room?
A. I think there was a window to the west.
Q. Was there not a window to the north?

A. There might have been with the curtain, and I not notice it, if the curtain was down.

Q. Did you go in there?

A. Yes, sir.

Q. Who did you find in there?

A. Hare, the man that was tried for horse-stealing; he was there with a guard, Smith—George Smith, I believe.

Q. Who else was in there?

A. That was all I saw.

Q. Did George Smith stay in there all the time?

A. He was in there when I got in there.

Q. Was he out of there at all?

A. He could not have been; he was not out of the room during the firing. I don't know when he went in there.

Q. The street on which this dining-room faces runs north and south?

A. Yes, sir.

Q. Is there a sidewalk in front of the building?

A. There was not at that time, but posts that held the awning up in front.

Q. How far into the street does that awning extend?

A. About six feet, I should think.

Q. And those points were used for hitching posts?

A. Yes, sir.

Q. Were there any posts right in front, besides those?

A. I never saw any.

Q. Sure there was not?

A. Pretty sure; there were two posts that held up the awning.

Q. Did you see anything hitched to those posts as you
26 went in?

A. No, sir.

Q. No horses hitched there?

A. No, sir.

Q. Sure?

A. Yes, sir.

Q. You say there is one room leading out of that dining-room.

A. Well, there was also one leading out on the east.

Q. That was the kitchen?

A. No, sir; it was not then.

Q. Have you been in the building since?

A. Yes, sir; the building is the same shape now as then.

Q. Are the doors the same now as then?

A. Yes, sir.

Q. Any other door that leads out of the room?

A. I think a door leads up out of the room.

Q. Five or six steps take up some room in the corner?

A. Yes, sir.

Q. After you got into this room where did Mr. Kelly and his wife sit?

A. They sat on the west end of the table; Mrs. Kelly sat to the southwest corner and Mr. Kelly to the northwest corner.

Q. You sat at the northwest corner on the north side?
A. Yes, sir.
Q. And he at the northwest corner, but on the west end?
A. Yes, sir.
Q. He sat right next to you?
A. Yes, sir.
Q. You were sitting down when Simmerman and Belmont came in?
A. Yes, sir.
Q. You three were all sitting down?
A. Yes, sir.
Q. How long was that table?
A. I don't know; I think there were 12 of us sitting at the table.
Q. Who sat next to you to the east when you first sat down?
A. Jerry Daily.
Q. What became of him?
A. He got up and went out, and then Simmerman and Belmont sat down.
Q. How far from you did Belmond sit?
A. In the next chair to the east of me.
Q. You can't be mistaken about that?
A. No, sir.
Q. Who sat next to him on the east side of him?
A. Simmerman.
Q. How near did Belmont sit to you?
A. Our elbows touched—just room to eat.
Q. How near to him sat Simmerman?
A. Well, just room to eat.
Q. Who sat next beyond Simmerman?
A. I can't tell.
Q. Who sat next to that person?
A. I don't know as I noticed.
Q. Who next?
A. I believe Benson was at the end of the table.
Q. You think that Benson sat near the northeast corner of the table?
A. He was at that end somewhere.
Q. You did not know the name of any person on the north side but yourself?
A. Not after Jerry Daily left.
Q. Who sat next to Benson?
A. I think Blackburn, but I can't place them all on the south side of the table.
Q. Can you name any of them that sat on the south side of the table?
A. Yes, sir; Mr. Burns for one, the deputy clerk.
Q. Who sat next to him?
A. I don't know.
Q. Who for another was on the south side?
A. I can't name another on that side.
Q. Did you know Jack Woods?
A. Not at that time; I had seen him once before that.

Q. Did you know him when he came?
A. No, sir.
Q. Had you heard there was going to be some fun there?
A. No, sir.
Q. Did you see the person come in there that you afterwards learned was Jack Woods?
A. Yes, sir; he came into the door from the street.
27 Q. Were there any persons at that time in the room that were not sitting down?
A. Some were waiting to get chairs to sit down.
Q. Who?
A. I remember Dr. Hollenbeck.
Q. Was he sitting down?
A. No, sir; I think he stood a little east of me.
Q. How long had he been standing there when Jack Woods came in?
A. I don't know.
Q. Did you see Woods open the door?
A. The door was already open.
Q. Who opened the door?
A. I don't know, but the people were going in and out so much the door was not shut much.
Q. Did you see Jack Woods step in?
A. Yes, sir; as soon as he stepped in.
Q. You were sideways to him?
A. Yes, sir.
Q. You were facing the south?
A. Yes, sir.
Q. He came in the door from the west?
A. Yes, sir.
Q. As he came in you turned and saw him?
A. I did not have to turn; the table sat right even with the door.
Q. Where is the door that leads into the room?
A. It is about two feet from the north side of the room.
Q. Where is the window?
A. That is in the south part of the room; south of the door.
Q. How wide is that table?
A. About three feet, I guess.
Q. How long was it?
A. I don't believe it was 12 feet long; the table might have been ten feet long.
Q. When you saw Woods step into the room, what did he do?
A. He came past me and past Belmont, put his arm, or hand rather, on Simmerman's shoulder, and said "You two boys consider yourselves under arrest." He put one hand on Simmerman's shoulder and threw a revolver in Simmerman's face.
Q. What kind of a revolver did Woods have?
A. A pretty big one; it was as big a one as I have seen in this part of the country; Belmont threw it behind him, and it was right towards me as I backed out of my chair; Belmont twisted Woods' arm back.

Q. Give the calibre of Woods' revolver.
A. Well, it was between 32 and 40, I should say.
Q. And that is as large as any you have seen in this part of the country?
A. I think so; I don't know much about revolvers.
Q. Was it loaded?
A. I don't know.
Q. Was it cocked?
A. I don't know.
Q. Was it a self-cocker?
A. I don't know.
Q. Woods said what?
A. He put his left hand on Simmerman's shoulder—
Q. Are you positive that he took his revolver out?
A. Yes, sir; he put his left hand on Simmerman's shoulder, and threw his revolver in Simmerman's face, and Belmont caught it and threw it back.
Q. Have you told all the language Woods used when he spoke to these men?
A. All I heard was this: he told Simmerman to throw up his hands, and said "You two boys consider yourselves under arrest."
Q. Who was he talking to?
A. I did not know until I saw Belmont twist his arm back; I knew then who he must mean.
Q. That was all you heard him say?
A. That was all.
Q. Hear anybody else say anything?
A. No, sir.
Q. How long was it light in the room after that time?
A. I don't think it was very long, because the lights were upset, or the lights went out; I suppose they went over; I don't know.
Q. Did you see any lamp broken?
A. No, sir.
Q. See any tip over?
A. No, sir.
28 Q. Will you swear the lamps went out?
A. I know it was dark.
Q. Will you swear it was dark or that you shut your eyes?
A. I know it was dark.
Q. Will you swear that the lamps went out?
A. No, sir.
Q. Will you swear that they were burning?
A. No, sir; I will swear it was dark, so dark could see but very little; just see where the door was.
Q. Do you think some one turned the lamps down?
A. I don't know; I say it was dark in the room.
Q. Do you swear to the jury that any of the lamps were not filled with oil?
A. I don't know; it was dark.
Q. That is the only explanation you wish to give, to the jury, is it?
A. Well I know it was dark.

Q. Do you think from the concussion of the revolvers when they went off the lights went out?

A. I think it might have done that; I have seen a revolver do that; I know that shooting a revolver near a light will put it out.

Q. Did any bullets hit the lamps?

A. I guess not.

Q. Then your conclusion is the concussion turned the lamps down a little and left them burning a little?

A. I don't say so.

Q. You were a witness once before in this case?

A. Yes, sir.

Q. You were examined by Mr. Bierbower?

A. Yes, sir.

Q. Did you swear then that you knew the first shot did not hit Jack Woods?

A. Yes, sir; I did.

Q. And you say that Belmont fired the first shot?

A. Yes, sir; he was just raising up.

Q. Was he not stepping back from the table?

A. Stepped back as soon as he could after rising.

Q. Did he have a revolver?

A. Yes, sir; a good sized one.

Q. A 34 revolver?

A. Well I don't know much about revolvers; I never owned one in my life.

Q. Where was Belmont as he fired the second shot?

A. He was making towards the door and he had Jack Woods' by the wrist dragging him towards the door; he had Woods' arm twisted so he could not do anything.

Q. What was Woods doing with his other hand?

A. I don't know; I did not see it.

Q. When Belmont fired the other shot what did Woods do?

A. He was still dragged by Belmont.

Q. That shot did not hit Woods?

A. No, sir; because I saw him shoot it right in Kelly's face and Kelly dropped.

Q. You swear positively you saw Belmont shoot Kelly?

A. Yes, sir.

Q. And you saw him fall?

A. Yes, sir.

Q. This was fresher in your mind at the other trial than now?

A. A little, I suppose.

Q. You told the exact truth then?

A. I believed so.

Q. It was the truth the best you could tell it?

A. Yes, sir.

Q. And what you told then would be as correct a version as what you tell now?

A. Yes, sir.

Q. When Mr. Bierbower at the other trial asked you to state your version of the affair, did you in answer say this: I had a chair next

to the door on the north side of the table; on my left sat Jerry Daily, but he got up just before these men sat down; Belmont sat next to him on the east and Simmerman sat beyond him; then this big fellow that was on the stand here sat beyond him; most of my time while at the table was occupied in talking with Mr. and Mrs. Kelly; when Mr. Kelly and his wife got up and went out, Sheriff Woods came right in past me and went by Belmont and said to Simmerman,

You two boys may consider yourselves under arrest; I got
29 up and fell back over my chair into the bed-room door on the north; Simmerman partly threw up his hands; then Belmont rose up and fired under his arm, and then two shots were fired by some one beyond Woods; I could see, as I was right behind Belmont; then Belmont turned and shot Kelly, who stood in the door; that was the last shot fired there; Kelly stood right on the threshhold and fell right into the room from the front door, from the sidewalk.

A. I suppose I answered that way.

Q. And when this question was put to you by a juror: You saw Belmont shoot under his arm? you answer, Yes, sir. Then you are asked: Do you know whether that took effect? you answer: No, sir; I don't know; if it hit Woods it must have hit him in front, and Woods was right back to Simmerman. You swore you did not know whether the shot hit or not; now you say it did not; when are you correct?

A. Both times; because I know since that it did not hit him, as I saw him laid out here in the court-house.

Q. Do you knew when that was?

A. It was in October.

Q. Do you know how many days after this shooting that was?

A. Two days after, I believe.

Q. Now, from your examination of Woods, you knew then?

A. Well, the question was not put to me as to what I learned afterward; I am swearing now from what I saw on the examination of Woods afterwards, and not on what I saw in the room.

Q. Who examined the body of Woods when you were present?

A. Joe Gilman and another person or two.

Q. Was Mr. Gilman a physician and surgeon?

A. No, sir; he was one of the coroner's jury.

Q. He lives in town here?

A. Yes, sir.

Q. Were you on the coroner's jury?

A. No, sir.

Q. Did you see where he was shot?

A. Yes, sir.

Q. Where?

A. In the back.

Q. Where in the back?

A. It was pretty near across the loins.

Q. What direction was the course of the ball after it entered the skin?

A. I could not tell.

Q. You don't know the exact position of Belmont when he shot?
A. He was just coming off his chair, just rising up.
Q. Then, if it hit him, it would have traveled upwards?
A. Yes, sir; if it hit him it would.
Q. You can't tell the jury anything about where the ball went after it got into his body?
A. No, sir.
Q. Do you know the size of the ball?
A. No, sir.
Q. Were you acquainted with Woods in his lifetime?
A. I spoke with him 6 or 7 years before that.
Q. You did not recognize him as he came into the room?
A. No, sir.
Q. Was there any person present at the coroner's jury to make a record of the examination?
A. No, sir.
Q. How many wounds did you see?
A. Two; there was one on each side of his backbone and about the middle of his back.
Q. What room was that in?
A. In the court-house here in the sheriff's room.
Q. You swear to the jury that you did not see Simmerman fire a shot?
A. I did not see him fire a shot.
Q. How old was Jack Woods?
A. I should say about 30 to 35 years old.
Q. How large a man?
A. Between 5 feet 6 and 5 feet 8 inches.
Q. What would he weigh?
A. 175 pounds or 180.
Q. What complexion?
A. Rather sandy.
Q. Heavy shouldered?
A. Rather heavy.

30 By Mr. MORLAN:

Q. After the first shot was fired, you stepped back to the door on the north side of the room; what did you do then?
A. I tried to get into that room, but I could not; I got in after the rumpus was over.
Q. In answer to the question put to you on the trial before, when you said it must have hit him in front, if it hit him, you say now it did not hit him, because he was hit in front?
A. Yes, sir.
Q. If the first shot had hit Woods, where of necessity must it have hit him?
A. In the front or in the side.
Q. You saw Woods as he came into the room?
A. Yes, sir.
Q. Did he have anything in his hands then?
A. I did not notice anything.

Q. He went by you and Belmont?
A. Yes, sir; and put his left hand on Simmerman's shoulder.
Q. Where did he stop?
A. Right between Belmont and Simmerman.
Q. At that time how did Belmont sit—as to you and Woods?

Defense object, as reopening State's case. Overruled. Defense except.

A. Belmont then sat right between me and Woods.

BENJAMIN BENSON called and sworn.

Questioned by Mr. MORLAN:

Q. What is your business?
A. Farming.
Q. What is your age?
A. Twenty-nine.
Q. Where do you reside?
A. In Kearney county.
Q. How long have you lived in Kearney county?
A. Four years.
Q. Look at the defendant here, Mathias Simmerman. (Witness looks at defendant.) Have you ever seen him before?
A. Yes, sir.
Q. When first?
A. I saw him in October, 1882, when court sat here.
Q. Where did you see him?
A. Over in the Prairie Home, in this town.
Q. Did you have any conversation with him.
A. I don't know whether it was with him or his partner; they were both together.
Q. Have any conversation with them, as to where they came from?
A. Yes, sir; they said they came from North Platte.
Q. What business were they in; did they say?
A. Said they had some ponies.
Q. What time of day was that?
A. It was at the supper table, between six and seven.
Q. Did you know Jack Woods?
A. No, sir; I was not acquainted with him.
Q. What day was it, the first time you saw this defendant?
A. I think it was the 16th of October, 1882; I think it was Monday.
Q. When you first noticed them, what were they doing?
A. They came into the door and took off their hats, and they stood there a little while until they could get places at the table; then they took chairs and sat down.
Q. Did they have any arms on them?
A. Yes, sir; two revolvers.
Q. What did they do with them as they sat down?
A. They had them lying on their laps, or the one that sat next to me had his on his lap; I could not tell about the other; I did not see into his lap.

Q. Where did you sit?
A. I sat at the northeast corner of the table.
Q. Which one sat next to you?
A. I think it was the smallest one; I am not sure.
Q. Did you see Jack Woods as he came in?
A. Yes, sir.
Q. What did he do?
31 A. He came in right up to these fellows, and laid a hand on the shoulder of each, and said "Halloa, boys; now consider yourselves under arrest;" the one that sat next to me then threw up his hands a little; then he brought his hands down and Woods' revolver came out then; then the one that sat next to the door, that is to the west of me and the other fellow, caught hold of Woods' hand; then a shot was fired, I think by the one that sat next to the door; then there were two shots in quick succession; then the lights went out.
Q. What did you do?
A. I got down under the table.
Q. State what each of those men did as near as you can.
A. As I said the one that sat next to me threw up his hands and they came down again; I saw the other one, the one that sat next to the door, have his revolver, and he caught hold of Woods' revolver or his hand, I don't know which; then a shot was fired, then two more in quick succession, then the lights went out.
Q. Who fired those shots?
A. The cowboys; I would not be positive as to which fired them; I think the one next the door fired the first shot; as to the other two I would not be positive, as I was just going down then.
Q. In what county and State did that shooting take place?
A. In Kearney county, State of Nebraska.
Q. When did it occur?
A. On the 16th of October, 1882.

Cross-examination by Mr. BURR:

Q. Are you the same witness that testified once before?
A. Yes, sir.
Q. You don't know who shot Jack Woods?
A. No, sir.

CHRISTIAN LARSEN called and sworn.

Questioned by Mr. MORLAN:

Q. State your age.
A. I am 37.
Q. Where do you reside?
A. I live in Minden.
Q. How long have you lived in Kearney county
A. Eight years.
Q. Did you ever see this defendant before?
A. Yes, sir.
Q. When did you first see him?

A. A little over a year ago.
Q. Where?
A. In town here.
Q. Have any conversation with him?
A. No, sir; I saw him on the street first.
Q. Where were you on the evening on the 16th of October, 1882?
A. At my home in the Prairie Home; I rented the place then.
Q. State what took place there that evening.
A. I was waiting at the time; several were there eating supper; just as they were sitting, eating, I saw those two men, Simmerman with another man, come in the door, and they soon sat down to supper.
Q. Did they have arms on their persons?
A. Yes, sir; they had two revolvers or three, and a big knife; they took a napkin and laid in their laps; then a man came in and shut the door after him, and walked right in between them, and told the man on the east to hold up his hands; then the fellow on the west grabbed Woods by the arm and threw him round so he faced him, or to the west; then the fellow on the east shot him in the back, and the fellow on the west said "Give him another one and shoot him dead;" then another ball was fired, and the lights went out.
Q. Anybody else shot?
A. I was shot in the hand.
Q. Who shot you?
A. Simmerman; he was the last man out; after he got out he fired three shots at me, and his pony got away, and I think Simmerman told a man over towards the other hotel to stop it; the man did, anyway; he held up his hand to him, and I thought he told him to stop him; Simmerman then got on and rode off.
Q. How many shots were fired after Simmerman got out?
A. He fired three shots after me.
32 Q. What did Belmont do?
A. He rode up and down the street and fired towards the porch.
Q. Do you know about the horses they had here?
A. Well, we corralled the horses the next morning, and a man came with the papers for them.
Q. Did you know the man?
A. No, sir.
Q. Is this the man here (pointing to previous witness, James T. Wray)?

Defense object as immaterial, irrelevant, and incompetent. Overruled. Defense except.

A. 15 or 16; I could not say for certain.
Q. Where did you get those horses?

Defense object as before. Overruled. Defense except.

A. We got them on the prairie, and I hired a boy to herd them.

Q. Had you seen them before that?

Defense object as before. Overruled. Defense except.

A. Yes, sir; Belmont, Simmerman, and two other fellows had them in their possession the day before, Sunday; I saw them Sunday noon.

Q. The same horses that you turned over to Mr. Wray?

A. Yes, sir.

Q. When was the last time you saw this defendant before he was arrested?

A. That evening, the 16th of October, 1882; he was getting on his horse.

Q. See him after that?

A. No, sir; I saw him get on the horse and ride off; I saw him about half a block off, over near Abrahamson's store.

Q. Was he riding fast or slow?

A. I did not pay attention; I ran into the house.

Q. Tell, as near as you can, where Simmerman sat.

A. He sat on the north side of the table, to the east—west of Simmerman. Woods came in between them and laid his left hand on Simmerman, and the other fellow twisted Woods right round between them. Woods said: "You consider yourselves under arrest." Then Simmerman threw up his hands a little ways, and then took them down again, when the other fellow grabbed Woods by the arm.

By a juror (DE LA BARR):

Q. You say one of the fellows caught hold of Woods and turned him round; which way did Woods face then?

A. He faced the door—the west door.

Cross-examination by Mr. BURR:

Q. You were the proprietor of the hotel, were you?

A. No, sir; but I rented it.

Q. You were a witness in the case before?

A. Yes, sir.

Q. What time of night was it that you went into the dining-room?

A. I was there, in and out, all the time after 5 o'clock.

Q. When did these two men come in?

A. I suppose it was pretty near six o'clock.

Q. They took napkins and put in their laps?

A. Simmerman did; I won't be sure that Belmont did.

Q. Did you know Simmerman from Belmont?

A. Yes, sir.

Q. You could distinguish the two, one from the other?

A. Yes, sir.

Q. Are you still running that hotel?

A. No, sir.

Q. Is the dining-room still in the same shape it was then?

A. Yes, sir; but it is a sitting-room now.

Q. It is the same size?

A. I think so.
Q. Was there any wash-basin in the dining-room that night?
A. No, sir.
Q. That was in a little north room?
A. Yes, sir.
Q. Who was in the north room at the time of the supper?
A. This man Hare and George Smith.
Q. George Smith was deputy sheriff in charge of Hare?
A. I think so.
Q. What time did they come in?
A. Hare was in there before, but Smith came in very nearly with Woods.
33 Q. Remember who came in next?
A. Well, Woods closed the door after.
Q. That was the west door, leading in from the street?
A. Yes, sir.
Q. And there was a door leading out north into the wash-room?
A. Yes, sir.
Q. And there was another that led out into a room on the east?
A. Yes, sir.
Q. That door is in the northeast corner of the room?
A. Yes, sir.
Q. Then there is an open stairway in the southeast corner?
A. Yes, sir.
Q. And just one window opening out to the west, south of the door?
A. Yes, sir.
Q. There is a window leading west from the wash-room?
A. Yes, sir.
Q. And one to the north?
A. Well, there is one, but it opens right against another building; it looks right against the boards of the other building.
Q. Were the curtains to the other windows down?
A. Yes, sir.
Q. How many lights were in the dining-room?
A. There were two on the table.
Q. Any hanging lamps?
A. No, sir.
Q. How were Simmerman and Belmont sitting as Woods came in?
A. Backs to the north.
Q. He came in a little north of them?
A. Yes, sir.
Q. Nearer which corner of the table was Simmerman sitting?
A. The northeast.
Q. And Benson where?
A. At the east corner.
Q. Where did Collins sit?
A. On the south side, to the west, I think; I could not say for certain.
Q. Mr. Kelly and wife sat on the west end?

A. I think so.
Q. How are you sure where Belmont and Simmerman sat?
A. Because I put my hands on their shoulders and asked them whether they would have tea or coffee.
Q. Had you brought them their order?
A. No, sir; I had not time.
Q. Did Woods speak to anybody else?
A. Not to my knowledge.
Q. What did he do?
A. He laid his left hand on Simmerman's shoulder and put his right hand in between them, and said "Throw up your hands," and said "You are my prisoners."
Q. Did he not say "Boys, consider yourselves under arrest?"
A. Well, maybe he did.
Q. You say the lights went out after the second shot?
A. Yes, sir.
Q. What put out the lights?
A. The sound of the revolver or the pressure of the air when they were fired.
Q. Did you not catch hold of the lamps and put them out?
A. No, sir;
Q. See anybody do it?
A. No, sir.
Q. You never told anybody that you put out the lights?
A. No, sir.
Q. What did you do?
A. I stood still; I could not do anything; I did not know what was up.
Q. See the others stand still?
A. No, sir; I saw others rushing round and getting down every way.
Q. When did you get out?
A. After it was all over.
Q. You were shot in the hand?
A. Yes, sir.
Q. When did you get that?
A. As I was going out the door.
Q. In which hand?
A. The left hand.
Q. The lights were out?
A. Yes, sir.
Q. Was it moonlight outside?
A. It was not very dark; I could see some.
Q. Simmerman shot you through the hand?
A. Yes, sir; I know because we stood there about 16 feet apart.
Q. Who went out of the house first of the 16 or 17 persons that were in the room?
A. Well I don't know how many there were in there.
Q. Which one of them went out first?
A. I can't tell.
34 Q. Who went first of Belmont and Simmerman?

A. Belmont.
Q. Sure of that?
A. Yes, sir.
Q. You were standing up all the time?
A. Yes, sir.
Q. Did you see Ericson come in?
A. No, sir.
Q. Did he not come in?
A. I did not see him; I had my eyes on Belmont and Simmerman.
Q. Where were you?
A. I was standing in the northeast corner of the room.
Q. Near the door that led into the store-room on the east?
A. Yes, sir.
Q. You do not know whether Ericson came in or not?
A. I did not see him.
Q. How could you see Belmont go out first then?
A. Because I was watching him.
Q. Did you see Smith come in?
A. Yes, sir; right with Woods and go into the north room.
Q. Did you see Belmont get on his horse?
A. Well, I saw him on his horse riding up the street shooting.
Q. Where were their horses hitched?
A. To the porch posts.
Q. How far up the street did he ride?
A. Up to the drug-store, north.
Q. How far was that?
A. 150 feet perhaps.
Q. Did you hear Belmont say anything as he rode up and down?
A. No, sir; I believe not.
Q. Did he not say "Keep in there you sons of bitches?"
A. I did not hear that; I have heard other people say that he said it.
Q. He was shooting his revolver?
A. Well, I saw him ride by and heard the shots.
Q. Why did you not testify on the other trial that Simmerman shot you through the hand?
A. I was not asked then; I just answer what I am asked.
Q. You were on the stand before?
A. Yes, sir.
Q. And you did not swear before that Simmerman shot you through the hand?
A. If I was asked the question I did.
Q. Will you swear that you don't know what you testified to before?
A. I don't know whether that question was asked me or not.
Q. Do you testify that Simmerman shot at you three times?
A. Yes, sir; when I came out of the door and two shots afterwards.
Q. Did you see him when he fired the first shot?
A. Yes, sir; he shot first at me and hit me; then I fired at him and he fired two shots back.

Q. Where did you stand out there?
A. Right on the porch.
Q. When you were shot in the hand did you turn and go back into the room?
A. No, sir.
Q. When Woods stepped into the room he stepped up behind them, and when he put his hand on Simmerman's shoulder he faced south?
A. Yes, sir.
Q. And his back was towards the north?
A. Yes, sir.
Q. Simmerman was where then?
A. To the left of Woods and Belmont to the right.
Q. When he was shot in the back was he looking out towards the door?
A. Yes, sir; he was facing west; he was between them and facing Belmont.
Q. As he stood in that position Simmerman was to his left?
A. Simmerman was behind him and a little to the left perhaps.
Q. You stood still?
A. Yes, sir.
Q. You stood right behind Simmerman?
A. Yes, sir.
Q. You saw Simmerman shoot?
A. Yes, sir.
Q. You had a revolver in your pocket?
A. Yes, sir.
35 Q. You saw him shoot again?
A. Yes, sir.
Q. And you saw him go out?
A. Yes, sir.
Q. And did not shoot him?
A. No, sir; there were so many in there I did not dare to shoot and I had no authority to shoot; I did not shoot at him until he shot me.
Q. You stood right behind him, about two feet from him?
A. Yes, sir.
Q. You did not get down on the floor?
A. No, sir.
Q. You did not crowd in the little north room?
A. No, sir.
Q. Are you a cool, clear, collected man in danger?
A. I don't know whether I am or not,
Q. You have not told your friends and neighbors that during the shooting you got excited?
A. Well, it is enough to make anybody excited; maybe I was a little excited.
Q. During that excitement you got out behind a coal-box pretty lively—a coal-box in the rear of your house?
A. No, sir; I did not go out there.

Q. You swear that you did not go out behind your house and get behind a coal-box?

A. Yes, sir; I swear that I did not.

Q. You have not had any conversation with any persons where you told them that during the shooting you ran out behind your house and got behind a coal-box that was there?

A. No, sir.

Q. Did you have a coal-box in the rear of your hotel?

A. Yes, sir.

Q. Did you seek it for shelter that night?

A. No, sir.

Q. Have you told any of your friends or neighbors in this town that you did run out there that night?

A. No, sir.

Q. Have you not told any person that you were scared?

A. No, sir.

Q. You think this shooting was enough to make anybody excited?

A. Yes, sir.

Q. Do you say you were not excited?

A. I might have been excited, but I stood right there and saw what I have stated.

Q. Did you wish to stand there and take the shots?

A. No, sir; but I stood there.

Q. Was there not a great confusion in the room?

A. There was at the start.

Q. Did not a good many get down under the table?

A. Some did.

Q. Did you see Ladimus jump over his chair?

A. No, sir; I think he jumped up and got back.

Q. See anybody turn those lamps down?

A. No, sir.

Q. What is it you tell the jury—that you were excited and confused?

A. I suppose I was a little excited.

Q. I suppose that with excitement, as with me, with excitement comes confusion; were you confused that evening with your excitement?

A. I don't know what that means.

Q. If you run out the back door and you thought you run out the front door you might be confused.

A. I did not say I did that.

Q. Was there any confusion in that room that evening?

A. I don't know what confusion means.

Q. How many persons got down under the table that evening?

A. I could not tell.

Q. What do you think?

A. I don't tell what I think; I tell what I know.

Q. Did one or seventeen get down on the floor?

A. Seventeen did not get down, I don't think.

Q. How many dishes were broken?

A. Not one was broken.

Q. Were you a witness before?
A. Yes, sir.
Q. Did you testify this way then? You were asked "At that time were you excited?" and you said "No, sir; I was as cool as any other time and perhaps cooler."
A. Maybe I did; I don't say now I was excited.
Q. Is your recollection now better than at the former trial?
A. No, sir.
36 Q. At the other trial you did not testify that Simmerman shot you?
A. I can't say.

By Mr. MORLAN:

Q. From the time the shooting commenced until it stopped, how long was it?
A. Three or four minutes.

By Mr. BURR:

Q. After this shooting occurred did not you go over to this furniture store?
A. Yes, sir.
Q. Before you were shot?
A. No, sir.
Q. Whose furniture store was that?
A. Kelly's.
Q. What Kelly was that?
A. The one that got shot.
Q. Were you shot then?
A. Yes, sir.
Q. Did you tell anybody there that you were shot?
A. I think so.
Q. Who did you see over there?
A. Johnson, Gordon, and Kelly's wife; I don't remember them all.

By Mr. MORLAN:

Q. Where were those ponies left?
A. Out on the prairie.
Q. What did Belmont and Simmerman do with the ponies after the shooting?

Defense object as immaterial and incompetent. Overruled. Defense except.

A. Not anything, that I know of.
Q. You saw Belmont and Simmerman have these ponies the day before?
A. Yes, sir; Sunday noon.
Q. After that what claim, if any, did they make to them?

Defense object as before. Overruled. Defense except.

A. They left town right away.
Q. What did you do with them?

A. We had them corralled here.
Q. Did you see Belmont or Simmerman during that time?
A. No, sir.
Q. Were you present at any conversation when Simmerman was present when Wood's name was mentioned?

Defense object as before. Overruled. Defense except.

A. That was near the hardware store on Monday, the 16th of October, 1882; I asked for Wood, meaning Lawyer Wood; Simmerman turned round quickly and said "What Wood?" He was eating an apple with a big knife.

JAMES P. LADIMUS recalled.

By a JUROR:

Q. You said the ball that Belmont shot did not hit Woods; in what direction would the ball go?
A. Little north of east, towards the door in the east.
Q. In what direction would the second shot go?
A. Right into Kelly's face, in the west door.

CHRISTAIN LARSEN, recalled.

By a JUROR:

Q. Was there any marks of any balls in the room?
A. Yes, sir; in the window, the west window; it was in the north light; it went through and struck a post outside.

Mr. BURR:

Q. Was there not a ball mark above the door?
A. Well, I had a carbine up over the door and Erricson came in and took it down and caught the trigger on the hat-rack, and it went off and went up through there; that was about 12 o'clock that same night.

By a JUROR:

Q. What course would this ball take that was fired by Simmerman?
A. It would go west, and the second also.

H. C. BLACKBURN called and sworn.

Questioned by Mr. MORLAN:

Q. What is your age?
A. Thirty-four.
Q. What is your business?
A. Farming.
Q. Where do you live?
A. In Logan precinct, Kearney county, Nebraska.
37 Q. How long have you lived in Kearney county?
A. Four years and a half.
Q. Where were you on the 16th of October, 1882?
A. Here in Minden.

Q. Were you at any time on that day over here in the Prairie Home?

A. Yes, sir.

Q. When?

A. About six o'clock in the evening.

Q. State if you ever saw this defendant before.

A. Yes, sir; I saw him there that evening.

Q. Well, state what took place there in regard to him.

A. He was in there eating supper, and another gentleman with him.

Q. Where did you sit?

A. On the south side of the table, and they on the north side.

Q. How did they sit in regard to each other?

A. Belmont sat on the west, and Simmerman, or the lame one, on the east.

Q. Did you see Jack Woods as he came in?

A. Yes, sir; he walked in behind them and said: "Boys, consider yourselves under arrest." Belmont raised up—Simmerman partially raised his hands—Belmont raised up and drew his revolver and caught Woods' hand and gave him a turn, and then Simmerman fired at Woods; as soon as Woods' revolver was turned Simmerman grabbed his revolver and fired two shots into Woods back; I saw the flash of the revolver; it was only two feet from him.

Q. Are you sure this man here is the man that fired those shots into Woods' back?

A. Yes, sir; because he was the smaller of the two, and darker complected.

Q. State what then took place.

A. There was a considerable rush made; I stood on that side of the table until the room was nearly cleared; then I passed round the table; Chris Larsen went out in front of me and fired two shots out of the door.

Q. Did you see Simmerman then?

A. He fired at Larsen; I saw him fire.

Q. Who fired first?

A. Larsen.

Q. What was the last you saw of Simmerman?

A. He was trying to get on his horse?

Q. When was that?

A. The 16th of October, 1882.

Q. In what county and State?

A. Kearney county, State of Nebraska.

Q. How many shots were fired in the room while you were in there?

A. Three; I won't be positive whether it was three or four.

Q. What did you see Belmont do?

A. I saw him catch Woods by the arm and give him a turn; that was all I could say he did.

Cross-examination by Mr. BURR:

Q. You were a witness here before?

A. Yes, sir.

Q. You testified to the facts then?
A. Yes, sir; as near as I could.
Q. Did you swear before who fired any of these shots?
A. I think I did.
Q. Did you not swear before that you did not know who fired them?
A. I said one was a stray shot; that I did not know where it came from; I saw no flash but heard the report.
Q. Did you not swear before that you only thought you knew who fired the second shot?
A. I don't think I did.
Q. Let me refresh your recollection. In your cross-examination, before, did you not swear to these words: "State what you saw" was the question, and your answer: "Sheriff Woods came into the room, and laid his hands on their shoulders, and said: 'Boys consider yourselves under arrest;' they hesitated, and he said, 'Throw up your hands.' Simmerman held up his hands part way—about half way; Belmont caught Woods' revolver and turned it off and then they both took their revolvers and a revolver went off, by whom I don't know." did you so swear?
A. I believe I did.
38 Do you say now that you know that you saw Simmerman shoot? A. No, sir; I won't swear positively, but I am very certain it was; I know it was the smaller man and the darker complected one.
Q. Is not this your further testimony before: Question. Do you know who fired the first shot? Answer. I am quite certain it was fired by Simmerman. Now have you changed your testimony any to make it more positive now?
A. No, sir.
Q. Your recollection was better then than now?
A. Yes, sir; I presume so.
Q. And you can't swear positively now that Simmerman fired one of those shots?
A. No, sir.
Q. Then it was a mistake when you said so?
A. Yes, if I swore positively; but I am very certain he did shoot.
Q. When Woods came in there and put his hands on their shoulders how far did Simmerman put up his hands?
A. About this far (witness holds his hands up about even with his shoulders).
Q. Which rose up first?
A. Belmont.
Q. Did you see Belmont fire under his arm?
A. No, sir.
Q. Who fired the first shot?
A. I don't know.
Q. How large a man was Woods?
A. A medium-sized man.
Q. How long was it after he came into the room before the first shot was fired?

A. A very short time.
Q. Can you tell the time before the first and second shots?
A. Might have been a minute.
Q. Did you see Woods fall?
A. No, sir.
Q. Did you see him go out of the room?
A. No, sir.
Q. Where did he fall?
A. In the door.
Q. Where was Belmont when Woods fell?
A. I don't know.
Q. Where were you?
A. In the southeast corner of the room.
Q. Where was Simmerman at that time?
A. He, Belmont, and Woods were there together.
Q. Everything was confusion then?
A. Yes, sir; there were two quick shots after the first.
Q. How did you get out of the house?
A. I came around the table, and soon after got a pail of water, going out of the back door.
Q. Did you see anybody go out of the door?
A. Not in particular; they were all going out together.
Q. Did you see George Smith in there?
A. He was in the wash-room with his prisoner, as I went in there, before I sat down at the table.
Q. Do you know how long Simmerman held his hands up?
A. No, sir; not long; he dropped them, then raised them a little a second time.
Q. Did you see Woods point a revolver at Simmerman's head?
A. No, sir; I saw him grab his revolver when he took his hand from Simmerman's shoulder.
Q. When the first shot went off what did Simmerman do?
A. I don't know.
Q. What sized revolver did Woods have?
A. I could not say.
Q. Which hand did Woods have on Simmerman?
A. The left hand.
Q. Which side did Woods carry his revolver on?
A. On his right.
Q. Did he step back?
A. He stepped back a little and drew his revolver.

By Mr. MORLAN:

Q. When Woods came in these two men were sitting right in front of you?
A. Yes, sir.
Q. Just state your best remembrance of the shooting as to Simmerman.
A. I saw him throw up his hands partially, and Woods stepped back to draw his revolver, and as Woods spoke a second
39 time he threw up his hands again a little; as Woods fetched up his hand with his revolver Belmont grabbed his hand.

Defense object to further statement by the witness as improper redirect testimony. Sustained. State excepts.

Court here renews its admonition to the jury under the statute before separating, and takes a recess for one hour for dinner.

Mrs. R. B. KELLY called and sworn.

Questioned by Mr. MORLAN:

Q. Your husband was killed the 16th of October, 1882?
A. Yes, sir.
Q. Where were you on the evening of that day?
A. I was here; we came from Newark and took supper at the Prairie Home.
Q. At that time did you see the defendant, Mathias Simmerman?
A. Yes, sir.
Q. Where?
A. At the supper table.
Q. Who was with him?
A. I don't know who it was.
Q. Where did this defendant sit at that table?
A. Almost opposite to me; I sat at the corner and he sat over just across from me, cornering across.
Q. Who sat next to him on the west?
A. The other man they call Belmont.
Q. What direction from Belmont did Simmerman sit?
A. On the left side of Belmont or east of Belmont.
Q. Were you there during the shooting?
A. No, sir.
Q. What did you do?
A. I had just got outside the door when the shooting commenced, and I went down street to the hardware store just north of the Prairie Home.
Q. After that did you see either of those men?
A. I saw one of them ride up the street and back; once was all I noticed.
Q. What did he do?
A. He fired off his revolver.

Cross-examination by Mr. BURR:

Q. You say that Belmont sat to the east of Simmerman at the table?
A. No, sir; I do not.
Q. At which end of the table did you sit?
A. Near the west end.
Q. Did you not just swear that Belmont sat to the east of Simmerman?
A. No, sir; Simmerman sat on the east side of Belmont.
Q. What time did you go into the room that evening?
A. Near six o'clock; it was not quite dark; the lamps were not lighted as we went in.
Q. You went in with your husband?

A. Yes, sir.
Q. How long were you there before these two men came in?
A. Perhaps half an hour; when we went in supper was not ready.
Q. While you were sitting at the table Jack Woods came in?
A. No, sir; I did not see Woods.
Q. Did you or Mr. Kelly sit nearest the door?
A. Mr. Kelly sat nearest the door.
Q. He sat to the north of you at the table?
A. I sat at the corner on the southwest and he sat at the end.
Q. You sat nearest to the corner of the room?
A. Yes, sir; to the southwest corner.
Q. Do you remember who sat next to Mr. Kelly?
A. Mr. Ladimus.
Q. Mr. Ladimus sat on the north side of the table?
A. Yes, sir; near the corner.
Q. You, Mr. Kelly, and Ladimus had some talk there?
A. Yes, sir.
Q. Were you acquainted with Jack Woods?
A. No, sir.
Q. Do you remember of seeing a man come in there that they afterwards called Jack Woods?
A. No, sir.
Q. What was the first thing you saw that led you to think there would be some shooting done?
A. I did not see anything, but I saw they were desperadoes; I saw both of them take their revolvers out and lay them on their laps.
40 Q. Did you see a man come in and lay his hands on their shoulders?
A. No, sir; I was not in there then.
Q. Did you go out of the room?
A. Yes, sir; we had got outside of the door when the shooting commenced.
Q. Where did you go?
A. I went to the hardware store right north of there.
Q. Whose was it?
A. I don't know; it had been put up since I had been here.
Q. Did your husband go with you?
A. No, sir.
Q. Where did you leave him?
A. Almost at the hotel door.
Q. Did you meet anybody at the door?
A. We met Dr. Hollenbeck, and shook hands with him.
Q. Why did not you husband go with you?
A. Well, we got separated by the crowd.
Q. Was there any excitement then?
A. Well, we had got a few steps from the door when the first shots were fired.
Q. Did you see your husband go back into the room?
A. No, sir; I saw him in the door, stooping over, wrestling with a man.

Q. Know who that man was?
A. No, sir.
Q. How long did you see that wrestling?
A. Just long enough to look back, and a gentleman took me by the arm and led me away.
Q. Might you not be mistaken in saying now that Simmerman sat to the east of Belmont?
A. No, sir.
Q. You have been mistaken before?
A. No, sir.
Q. Were you not at the other trial?
A. If I said differently it was misspoken; I was not mistaken.
Q. When you testified before you did say that Simmerman sat on the west side of Belmont.
A. I don't know but I did speak it so, but corrected myself at once.
Q. Which one of the facts or positions was a mistake the other time?
A. The mistake I made was in my speech, in saying that Simmerman was sitting on the west of Belmont; it should have been that he was on the east side of Belmont, and I corrected myself and so stated.
Q. Did you see Simmerman put a revolver in his lap?
A. Yes, sir.
Q. What kind of one was it?
A. It was a good-sized revolver.
Q. Do you know the size of revolvers?
A. Not particularly; I am not well posted on revolvers.
Q. Can't you give some description of it?
A. I was silver mounted, or a bright looking revolver; quite a nice one.
Q. You could not tell whether it was a 32 calibre, or what it was?
A. No, sir.
Q. You did not see anything that occurred in there when Woods was there?
A. No, sir.

By Mr. MORLAN:

Q. This mistake that has been spoken of, you corrected it as soon as you found it out?
A. Yes, sir; I felt it my duty to do it at once.
Q. You knew how they were seated?
A. Yes, sir.

By Mr. BURR:

Q. How did you learn that you had made a mistake?
A. I thought of it soon after I made it.
Q. Mr. Bierbower came to you and spoke of it?
A. No, sir.
Q. Did any other person?
A. No, sir.

E. W. FOSBERRY called and sworn.

Questioned by Mr. MORLAND:

Q. Where do you reside?
A. Seven miles west of this town.
Q. In what business?
A. I am running a store over there and a farm.
Q. How long have you lived in the country?
A. Ten years next spring.
Q. Did you ever see the defendant here before?
A. Yes, sir.
41 Q. When first?
A. A year ago last October at the time the court was here.
Q. Did you have any conversation with him then?
A. No, sir; I think not.
Q. Did he tell you what business he was in?
A. No, sir.
Q. Were you present when the name of Wood was mentioned by some one?
A. Yes, sir.
Q. When was that?
A. To my recollection it was in the forenoon of the day that the shooting was done; in that evening.
Q. State what the defendant did and what was said.

Defense object as incompetent and irrelevant. Overruled. Defense except.

A. I was standing over on the street and they were out just off the sidewalk, Belmont and Simmerman; some one said "Here comes Wood," and both Belmont and Simmerman dropped their hands on their revolvers.

Defense object as not responsive to the question. Overruled. Defense except.

Both of them dropped their hands on their revolvers; then somebody—I can't say whether it was one of these men or not, but some one—asked "What Wood?" Just then Lawyer Wood, of the town here, came up and some one called him by name, and they went off about their business.

Cross-examination by Mr. BURR.

Q. What kind of revolver did the defendant have?
A. I can't tell.
Q. Or that Belmont had?
A. I can't tell.
Q. How far were you from them?
A. I was as near to them as I am to Simmerman now (perhaps 15 feet.)
Q. You saw them put their hands on their revolvers?
A. Yes, sir.
Q. Put their fingers on the triggers?

A. I did not notice that.
Q. Did you see the muzzle of any revolver?
A. No, sir.
Q. Or the barrel?
A. No, sir; I just saw them put their hands onto their revolvers; the handles of their revolvers were in plain sight.
Q. Did it look very dangerous round there at that time?
A. No, sir.
Q. Did you feel in danger?
A. No, sir.
Q. All you saw was that they put their hands down to where their revolvers were?
A. Yes, sir.
Q. Who were the others that were there?
A. I don't know.
Q. Who spoke about Woods' name?
A. I don't know.
Q. What did the defendant here say?
A. I don't know as anything.
Q. If either of them said anything, you would have heard it?
A. Well it is possible that one of them said "What Wood?" I know I heard that, but can't say who said it.

Dr. J. W. HOLLENBECK called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you reside?
A. Here in Minden.
Q. What is your business?
A. I am a physician.
Q. How long have you practiced medicine?
A. About seventeen years.
Q. Were you in this town on October 16th, 1882?
A. Yes, sir.
Q. Did you see this defendant at the Prairie Home on the evening of that day?
A. Yes, sir.
Q. State what he did there
A. I [had] just come in from the country; as I went in the door of the Prairie Home I met Mr. Kelly and his wife and shook hands with them; then I took off my overcoat and looked around to see if there was a seat; Simmerman sat at the table with Belmont on his right; I went to hang up my coat and heard a rustle and heard the word "arrest;" then there was a shot fired and I turned and saw this man Simmerman fire a shot; I know it was this man here;
42 he had long black hair; I saw him before that day; he was right behind Woods and east of him when he fired; Belmont was west of them both; I then thought I would take a walk into the bed-room; there were two or three shots fired after I got into the bed-room; I don't know just where the shots were fired that I heard after I got in there.

Q. You went in there after the first two shots?

A. Yes, sir.

Q. This defendant fired one shot—the second shot?

A. Yes, sir; Woods and Belmont were near together to the west of Simmerman, Belmont being up first; then this man here rose up and I saw a revolver in his hand.

Q. At whom was this shot fired that you saw Simmerman fire?

A. Belmont and Woods were about 18 inches from the table and Simmerman's revolver was pointed in the direction of them; Belmont had jumped up and whirled round and stood nearly with his face to the northeast, facing Woods, and Simmerman was back of Woods.

Q. Where next did you see Woods?

A. Well, after it was all over I went to the door and Mrs. Kelly asked me to look after Reuben to see if he was dead, and I told her he was, and she asked me to look through his clothes, and I looked through his pockets and found some money; Woods then laid outside of the door on the sidewalk.

Q. What condition was Jack Woods in then?

A. He was dead. Kelly was just inside the door lying on his back; then I was sent for to go down to the drug store to attend to young Collins.

Q. How many wounds were there on Woods' body?

A. Two in the back.

Q. What would be the natural result of either one of these wounds?

A. Either one would have been fatal; one was about two inches below the shoulder-blade and the other was a little lower on the other side of the spinal column.

Q. Where was Collins shot?

A. In the back, a little lower down than Woods; I think the ball went clear through.

Q. Where was Kelly shot?

A. The ball went in at the chin and produced instant death; Collins lived about thirty minutes perhaps; he died from internal hemorrhage.

Q. Where was that shooting done?

A. In Minden, Kearney county, Nebraska.

Q. When was it done?

A. On the 16th of October, 1882.

Cross-examination by Mr. BURR:

Q. Are you a physician and surgeon?

A. I am.

Q. At the time that you looked at Jack Woods did you examine his wounds to see just where the shots went?

A. I did not, as I was not called on to make a close examination, but I examined them some, enough to satisfy me that they were fatal.

Q. Did either one of the balls go through the body?

A. Neither one went through, but I could feel one ball on the other side just under the skin.

Q. Where was it?

A. Just under the sternum or breast bone; I could not say which ball it was.

Q. Do you know where the ball went that went in highest up in the back?

A. No, sir; I did not trace it.

Q. Did both balls enter the back?

A. Yes, sir.

Q. There was no wound in either side?

A. No, sir.

Q. The first shot was fired as you were hanging up your coat?

A. Yes, sir.

Q. The next shot, it is your impression that this man fired it?

A. Well, I am quite positive that he did.

Q. Did you see Belmont?

A. Yes, sir.

Q. Did he have a revolver in one hand or in both hands?

A. I could not say, but the glitter of the other revolver I saw plainly.

43 Q. All three were right together?

A. No, sir; Belmont and Woods were close together; this man was free from the others.

Q. Did you see him throw up his hands?

A. No, sir.

Q. Hear Woods tell him to?

A. No, sir.

Q. You saw Woods come in?

A. Well, I heard a rush by me as he came in.

Q. How many others were in the room?

A. I could not tell.

Q. How long between the first and second shots?

A. I could not tell; I could just turn round and the second shot was fired.

Q. How long before another shot?

A. Well, I could not say, as I went into the north room, and George Smith was there with Hare; I said, "What the dickens is the matter?" Smith said "Keep still; they are trying to arrest some cowboys."

Q. Any one else in there besides Hare and Smith?

A. Yes, sir; some one; I don't know who it was.

Q. Did you see Woods fall?

A. No, sir.

Q. Or Kelly fall?

A. No, sir.

Q. Did you see Sheriff Ericson?

A. No, sir; not at all.

Q. Did the lights go out?

A. Yes, sir; after the second shot was fired; I suppose from the concussion caused by the shooting.

Q. Do you think that would put out the lights?

A. I don't know; they were pretty large revolvers they had; I saw one of the shells that was said to be used.

Q. See anybody get under the table?

A. No, sir.

Q. Did you see any lamps turned over?

A. No, sir.

Q. When did the lamps go out?

A. Just as I went into the north room.

Q. Was anybody against the door?

A. Yes, sir; at first, but I pressed it in.

Q. Did Smith look out?

A. Not that I know of.

Q. Did Hare?

A. I don't know.

Q. Did he not say, "Let me look out and see what is going on?"

A. Not that I know of.

Q. How long did you remain in that north room?

A. Well, until after the shooting was over; they had gone out of the room then.

Q. Can't you tell how long you were in that north room?

A. I can't tell.

Q. You were not there over three minutes?

A. Yes, sir; more than that.

Q. Fifteen minutes?

A. No, sir.

Q. Not to exceed five minutes?

A. Probably not; I could not say exactly.

Q. In what part of the room did you hang your coat up?

A. There was a rack in the northwest corner of the room, on the west side of the door going into the bed-room.

Q. Then when you got your coat hung up all you had to do was to run along east and into the room?

A. Well, there is about four feet of the rack; so the door was not far off.

Q. You saw Simmerman pointing his revolver west?

A. Yes, sir.

Q. That was not right towards you?

A. No, sir; but close as I wanted it.

Q. See him pointing one at you at all?

A. Well, not exactly, but I did not know but he would.

Q. See his revolver go off?

A. Yes, sir; I saw the flash of it, and then I went right into the north room.

Q. You could not be mistaken, and that Belmont fired that shot?

A. No, sir; I am not.

Q. Belmont was standing on the north side of the table?

A. Yes, sir; Simmerman was towards the east end of it, and Belmont was west of him.

44 Q. Did you not in your former testimony state that he was pointing a revolver directly towards that door leading into the bed-room?

A. No, sir; that would be right towards me; I was at that door.

Q. Did you not swear this way before? Here is a question by Mr. Hamilton on cross-examination: Where were you at the time the first shot was fired? Ans. I was hanging up my coat and did not see the first shot fired, but turned and saw Simmerman fire a shot, holding his revolver nearly toward me.

A. Yes, sir.

Q. Now how far was the north side of the table from the south side of the room?

A. I don't know; I should say if the room is 14 feet square, it would be ten feet; there was room to go in behind the chairs on the south side of the room.

Q. Well, tell how far it was from the north line of the table to the south wall of the room.

A. I could not say.

Q. How far did Simmerman sit from the east end of the room?

A. Well, it was just about the same distance from the end of the table to the wall as it was from the side; the waiters could go back of the chairs and he sat just around on the north side of the table.

Q. Was it over six feet from where Simmerman sat to the east wall of the room?

A. About that I should say.

Q. When Simmerman pointed his revolver to the west you stood at the door northwest of him?

A. I was at about the middle of the hat-rack, or about 12 or 14 inches north of the range of his revolver, and a man seeing his revolver come up like that would think it was coming pretty close to him.

Q. Do you know whether the bullet you felt in Woods' body was the bullet from a fresh wound?

A. I did not examine it closely, but I think it was; I don't think there was any pocket there.

Q. Who examined him for the coroner?

A. I could not tell; I was not present at the time the jury were called.

W. W. WOOD called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you reside?

A. In Minden, Kearney county, Nebraska.

Q. What is your business?

A. Attorney-at-law.

Q. How long have you lived in Kearney county?

A. About five years.

Q. On the evening of the 16th of October, 1882, did you see this defendant?

A. Yes, sir.

Q. State what he was doing.

A. I was at the Commercial Hotel, standing just inside the door, and I heard shooting down this way; I started down towards the

Prairie Home, and got probably half-way across the street, from Abrahamson's store, and I saw Simmerman shooting back towards the Prairie Home; I know he shot twice, and I think three times; he seemed to have some difficulty getting on to his horse; he got on finally, and he and the other man rode up by the Commercial Hotel; I had gone back to the hotel, and a number of us stood under the porch of the hotel; he or Belmont said: "You God-damned sons of bitches, get in there;" I went into Abrahamson's store, and I went out again, and saw them go down the road on the lope.

Q. When did you next see him?
A. When he came back here for his first trial.
Q. Do you know anything about the horses they had here?
A. Yes, sir; I saw them several times.
Q. Do you know what became of them?
A. No, sir.

45 Cross-examination by Mr. BURR:

Q. Do you know where Mr. Robinson lives?
A. Yes, sir; right opposite the Commercial Hotel, or did then.
Q. How near were those parties to that place when you heard them say what you have stated?
A. Well, the street is 100 feet wide, and they were a little west of the middle of the street.
Q. Did you see them down near the Prairie Home?
A. Yes, sir; this man here was trying to get on his horse, and the other man was riding round shooting his revolver.
Q. Which way did they ride off when they left?
A. Off southwest by the Commercial Hotel.

LARS PETERSON called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you live?
A. In Kearney county.
Q. What is your business?
A. Farming.
Q. Where were you on the evening of the 16th of October, 1882?
A. Here in town.
Q. Were you at the Prairie Home that evening?
A. Yes, sir.
Q. Did you see this defendant there?
A. Yes, sir.
Q. State what he did there that evening.
A. He was sitting at the table at supper.
Q. What next did he do?
A. Well, I don't know; I did not see him shoot any shots that I was sure of; I did not know the difference in the men; I saw the man that sat on the east side fire a shot at Jack Woods' back.
Q. What did the other man do; did he take his pistol?
A. Yes, sir; I don't know what he did with it; he took Woods by the arm and the other man fired one shot at his back; that was all

I saw; I then went back into the back room; I saw them out on the street right away afterwards as they rode away.

Q. Did you see Jack Woods that evening?

A. Yes, sir.

Q. Where did you sit?

A. At the east end of the table.

Q. What did Jack Woods do as he came in?

A. I thought he said "Hands up," or "Hold up your hands." I am not certain just what it was.

Q. What did he do?

A. I don't know whether he put his hands on them or not.

Cross-examination by Mr. BURR:

Q. What time did you go into that hotel?

A. I don't know; just a few minutes before Jack Woods came in.

Q. Had you seen either of these men before?

A. Yes, sir; in the afternoon.

Q. Could you tell how they were sitting at the table?

A. No, sir.

Q. You would not want the jury to understand you to say that Simmerman was sitting on the east or west?

A. No, sir.

Q. Jack Woods said "Hands up?"

A. I think so, and the man to the east threw up his hands, and the other man caught Woods, and then the man on the east got up and pulled his pistol and fired right into Woods' back; I don't know which man it was, but it was the man that sat to the east; I know which side he was sitting on.

Q. You don't know whether it was Simmerman or Belmont?

A. No, sir.

By a JUROR:

Q. Where was the man sitting that did the shooting?

A. The man on the east side.

By Mr. BURR:

Q. As either of these men got up, did you hear a revolver drop on the floor?

A. No, sir.

By a JUROR:

Q. Which way was Jack Woods facing when the shot was fired?

A. He was facing the west door, towards the street.

W. H. VAN HISE called and sworn.

Questioned by MORLAN:

Q. Where do you reside?

A. In Minden.

46 Q. Were you here in October 16th, 1882?

A. Yes, sir.

Q. Did you see any of the shooting that evening?

A. Yes, sir; I first heard shooting, and was in my store; I came out and saw a man at the head of a pony, and he fired a pistol directly in front of the hotel called the Prairie Home; as he fired it seemed to frighten the pony and he began to rear and plunge and got away from him, but he finally got control of the pony again about half-way over to the Commercial Hotel.

Q. Did he get the pony himself?

A. I think another man headed the pony off some.

Q. Did you see more than one shot fired?

A. No, sir; not then. There were other shots fired, but I don't know who fired them.

Q. Who fired this shot that you saw?

A. The one that got on his pony last; the one that caught his pony up on the street.

Cross-examination by Mr. BURR:

Q. What kind of a store did you keep?

A. General merchandise.

Q. Where is your store?

A. About 20 feet south of the Prairie Home, on the same street.

Q. How dark was it that night?

A. Not very dark.

Q. Was the moon shining?

A. I think it was a clear evening.

Q. You heard the firing and stepped out?

A. Yes, sir.

Q. You saw this man fire a shot?

A. Yes, sir, before he got on to his pony; he then stood by a post in front of the Prairie Home, the post farthest south.

Q. Which direction was the shot fired?

A. I should judge right towards the hotel, and, I should judge, towards the door.

Q. How far is it between the two posts?

A. I think there are more than two posts; I think the horses were tied to the first and second posts from the south.

Q. How far apart were these posts?

A. I could not say; the building is about 22 feet long, I should think, and I believe there are four posts.

J. W. GORDON called and sworn.

Questioned by Mr. STEWART:

Q. Where do you reside?

A. Minden.

Q. What is your business?

A. I am postmaster here.

Q. Were you in Minden on the 16th of October, 1882?

A. Yes, sir.

Q. State what you saw on the evening of that day.

A. I saw all the shooting done outside by Simmerman; I walked

across from the Commercial Hotel towards the Prairie Home, and while going across there were two shots fired; the people were running in all directions; immediately after that I saw Simmerman step off the porch; his pony was hitched at the south post, and as he had his arm up to take the pony some one fired at him from the door; I think it hit the horse as he jerked it up; he then fired at the door, and a man fell back, and Simmerman fired again down the street; his pony got away, and a man named Leach caught his pony or headed it off, so that it went back towards Simmerman; he got on his pony, and brought his revolver over his shoulder and said, "Get in, you sons of bitches, or I will shoot every one of you;" that was all I heard.

Cross-examination by Mr. BURR:

Q. You know that was Simmerman?

A. Yes, sir; I recognized him, and I did not take my eyes off from him.

Q. You were where?

A. At the northeast corner of the Commercial Hotel; it was light enough to distinguish a man ten rods away.

Q. How many shots were fired at him from the door?

A. I said one man fired at him from the door.

47 Q. Did you see a man down the street firing a revolver?

A. Yes, sir.

Q. Was another horse hitched at one of the posts?

A. I saw no other horse hitched there; I saw a dozen horses hitched along the street there.

Q. Was there any other horse hitched at the Prairie Home?

A. No, sir; I did not see any.

Q. When the man fired from the door at him or his pony it was aimed right towards you?

A. Yes, sir; very nearly.

Q. Did you hear the ball whiz past you?

A. No, sir.

Q. Did you stand right there?

A. Yes, sir, until he ordered us in.

Q. You stood right there?

A. No, sir; I went in, as any reasonable man would.

Q. You stood right there until they went by?

A. I went inside when they told us to.

Q. You did not hear one of them say "Oh, why did you do this?"

A. There was no such language used that I heard.

Q. They were not more than 15 or 20 steps from you?

A. No, sir.

Q. You did not hear any such remark?

A. No, sir.

W. H. COPELAND called and sworn.

Questioned by Mr. MORLAN:

Q. Where do you reside?

A. In Minden.
Q. How long have you resided here?
A. Since September a year ago.
Q. Where did you live formerly?
A. In two or three different places in the last five years.
Q. Did you know Jack Woods?
A. Yes, sir; in Orleans four years ago, and in Culbertson.
Q. Where did you last see him?
A. Here in Minden.
Q. Was he dead or alive?
A. He was dead when I saw him; he was brought into the drug store; that was the first time I had seen him for three years.
Q. This was the time Kelly, Jack Woods, and Collins were killed?
A. Yes, sir.
Q. Did you see any of the shooting?
A. No, sir.

W. H. VAN HISE recalled.

By a JUROR:

Q. Do you know which one of the men it was that fired the shot that you saw and got on his pony?
A. I could not tell; I know the man that fired the shot was the man whose pony got away on the street.

By Mr. BURR:

Q. Do you know which man's pony got away first?
A. Only one got away; the first man I saw was the one whose horse got away.
Q. Could you not tell whether he was a lame man or not?
A. No, sir, I could not; I did not know there was a lame man in town; I had been sick all day.

JOHN BURNS called and sworn.

Questioned by Mr. STEWART:

Q. Where do you reside?
A. In Minden.
Q. What is your occupation?
A. I am deputy county clerk.
Q. Were you in Minden on the 16th of October, 1882?
A. Yes, sir.
Q. Were you at the Prairie Home that evening?
A. Yes, sir.
Q. Did you see anything occur there unusual?
A. No, sir.
Q. Did you see Simmerman and Belmont there that night?
A. Yes, sir.
Q. Where were they?
A. They were sitting at the table eating their supper.
Q. How were they sitting?

A. Belmont sat to the west and Simmerman to the east on
48 the north side of the table.

Q. Where were you sttting?

A. I was sitting right across from Simmerman; I was on the south side of the table and right opposite to Simmerman; I left and had just got across to the court-house when I heard the first shot.

Cross-examined by Mr. BURR:

Q. What kind of an evening was that evening?

A. I think it was star-light, rather a light evening.

Q. The sun had gone down?

A. Yes, sir.

Q. How long had you been over there?

A. Perhaps half an hour.

Q. Were the lights burning when you went over there?

A. No, sir; I think they were put onto the table just before I left.

Q. How far do you think it is from the north line of the table over to the south wall of the room?

A. I could not say; I don't know how wide the room is.

Q. Suppose the room was 14 feet square?

A. Well I would say ten feet; the table sat very nearly in the center.

Q. The door from the west was on the north side of the table?

A. Yes, sir.

Q. Was there as much room as that on the south side of the table?

A. I could not say.

Q. How wide a table was that?

A. It was an ordinary table, perhaps three or four feet wide.

Q. How much room was there on the south side?

A. Well, plenty of room to get round behind the chairs.

Q. You can't say how far it was?

A. No, sir.

J. H. JENSEN called and sworn.

Questioned by Mr. MORLAN:

Q. Where were you on the 16th of October, 1882?

A. I was sitting at the center window in the east end of this court-room.

Q. State what you saw.

Defense object as incompetent. Overruled. Defense except.

A. I saw Simmerman here, oppposite the door of the Prairie Home, holding his pony, and making an effort to get on his pony; it kind of swung round, and he fired then with his right hand towards the Prairie Home, and then some one fired from the Prairie Home, and there were two other shots fired by both parties, and the other man, the light-complected man, was pursuing two men by the house, and one of them got down behind a dry-goods box and fired one shot; Belmont was leading his horse then, and he followed the other man round behind Van Hise's store, and then he got on his horse and rode back, and went off with Simmerman to the south.

Cross-examination by Mr. BURR:

Q. You are clerk of the court here?
A. Yes, sir.
Q. And you were at that time?
A. Yes, sir.
Q. You were in the court-room here?
A. Yes, sir; writing my records.
Q. You knew these parties here?
A. Yes, sir; I saw them the day before and during that day.
Q. How far was it from here to where you saw them?
A. Perhaps two hundred feet.
Q. Did you ever talk with them before?
A. No, sir; but I saw them, at dinner, at the Prairie Home; I dont know that they ate dinner there, but they were in there as I came out; they came in and laid their hats down; there were four of them then.
Q. Did they have their hair combed?
A. I did not take particular notice; I noticed that Simmerman's hair was pretty long.

49 CHARLES ERICSON called and sworn.

Questioned by Mr. MORLAN:

Q. You are sheriff of this county?
A. Yes, sir.
Q. And was on the 16th of October, 1882?
A. Yes, sir.
Q. State all you know of this shooting affair from the beginning.
A. Well, our court was in session here on Monday, the 16th of October, 1882, and Jack Woods came here and asked me if I had seen any horses branded with a "lazy L;" I told him I had not, but there were some horses here and some horsemen, and he better go out and see them; after court adjourned I went out to find him; I found him near the bank; I asked him if he had found the horses; he said he had, and said the men were round here somewhere; I said they were at the Commercial Hotel or the Prairie Home; he started off, and went to the Prairie Home and went in; as I got there two shots were fired, and as I went in one was fired.
Q. Who fired those shots?
A. I saw who fired three of them; Simmerman fired one of the shots, and the other man fired two, the light-complected one.
Q. What position were they in?
A. The light-complected one stood farthest east, facing me, and Simmerman was back to me as I came in.
Q. What was done with those horses that they left here?
A. I drove them into a corral that night, after the shooting was done.
Q. What corral?
A. Mr. Kent's corral.
Q. Where did you see the last shooting done?

A. Outside.
Q. Where were you?
A. Out of doors, too.
Q. Where did you last see them?
A. Driving out of town; they went west from the Commercial Hotel.
Q. When did you last see Simmerman?
A. Well, they were going out of town on horseback on a slow trot.
Q. When did you next see Simmerman after that?
A. At Lincoln.
Q. What became of those ponies?

Defense object as immaterial and incompetent. Overruled. Defense except.

A. Tom Wray came after them in two or three days.

Cross-examination by Mr. BURR:

Q. You were sheriff of Kearney county in 1882?
A. Yes, sir.
Q. You say there was one shot fired before you went into that room?
A. Yes, sir; I think I had my hand on the knob of the door.
Q. You did not see the person that fired it?
A. No, sir.
Q. When you went into the room how long had Jack Woods preceded you?
A. A very few minutes.
Q. You knew Jack Woods had just gone in?
A. Yes, sir.
Q. Did you see Woods as you went in?
A. Yes, sir; he was just turning to take steps to get away from them; he acted like he had been shot; he was staggering.
Q. As you went in where was Belmont?
A. He was on the east of Woods.
Q. Where was Simmerman?
A. He was on the west of Belmont; I run right into Simmerman and caught hold of him, and tried to hold him until I could get my pistol out; I got him onto the floor, and he got away from me; then two shots were fired; Simmerman fired just as I got hold of him, and Belmont fired the other one.
Q. Where did the shot go that Simmerman fired?
A. Towards the door.
Q. When you went in were the lights out?
A. I think they went out at the second shot.
Q. If Simmerman had shot Woods where would he have hit him?
50 A. He could not have hit him the first shot, but he might the second shot. There were two shots fired before I got hold of Simmerman.
Q. The second shot was fired when you had hold of him?
A. Yes, sir.

Q. That could not have hit Woods?
A. O, no, sir.
Q. When did Woods fall?
A. As I went down with Simmerman; and I thought he was shot.
Q. After you got in there and got hold of Simmerman yourself, the position of all these parties changed?
A. Yes, sir.
Q. Can you describe the position of those parties when they changed?
A. No, sir; I supposed Belmont did the shooting, because the shooting came from that direction.
Q. You had hold of Simmerman?
A. Yes, sir.
Q. Where did he go then?
A. He went out and got behind the horse.
Q. Did you see him fire after he got on his horse?
A. Yes, sir; they both made a charge on me.
Q. Did you see your deputy, George Smith?
A. Yes, sir; he went in right behind Woods, and Dr. Schultz next; then I went in.
Q. Can you swear to this jury that Simmerman shot Woods?
A. No, sir; I can't say he did.
Q. Is it doubtful in your mind whether Simmerman shot Woods or not?

State objects as incompetent.

By the COURT: You may state the facts.

A. Yes; it is doubtful, because I did not see him do it.
Q. When you went in that door, as the first shot was fired, Jack Woods was facing the west door that you went in at?
A. He was just standing out from between them like, and his back was to the southeast.
Q. Can you tell the jury if he was pale?
A. Yes, sir, and walked a little to one side; I supposed he fell right down there; I did not see him fall.
Q. Do you know what put the lights out?
A. I think the shooting did it.
Q. How many shots were fired in there altogether?
A. I think five.
Q. One was when your hand was on the door knob?
A. Yes, sir.
Q. You are not mistaken as to the position of Woods as you went in?
A. No, sir.
Q. And you met Simmerman as you went in?
A. Yes, sir.
Q. You had seen Simmerman before that day?
A. Yes, sir; he was the only man of the four that I took notice of.
Q. Did he say anything to you?
A. I don't remember as he said anything.

By Mr. MORLAN:

Q. Who went in before you?
A. George Smith, right after Woods.
Q. You had no invitation to go in?
A. No, sir.
Q. The lights were burning as you went in?
A. Yes, sir.
Q. Did you not tell me just before coming here that you did not have time to take in the position, and whether it was Belmont or Simmerman that you got hold of?
A. Of course I did not know at first.
Q. Did you say that both of them charged on you?
A. Yes, sir; I got behind a dry goods box.
Q. Who was ahead?
A. Simmerman.

W. W. WOOD recalled.

By Mr. MORLAN:

Q. Do you know where the hotel called the Prairie Home is?
A. Yes, sir.
Q. And the room where the shooting was done?
A. Yes, sir.
Q. Have you measured that room?
A. Yes, sir; it is 13 feet four inches east and west, and 12 feet eleven inches north and south.

State here rests its case.

51 The court here renews its admonition to the jury and takes a recess for ten minutes.

Defense here make a written motion to strike out the evidence of witnesses Wray, Nelson, and Eldridge as incompetent. Overruled. Defense except.

Evidence for the Defense.

GEORGE SMITH called and sworn.

Questioned by Mr. BURR:

Q. Where do you live?
A. Here in Minden.
Q. Did you in October last?
A. Yes, sir.
Q. Do you remember the night of the shooting of Jack Woods?
A. I think I do.
Q. What were you doing on that evening?
A. I was guarding a man here named Frank Hare.
Q. You were deputy sheriff then?
A. No, sir.
Q. What official position did you hold?
A. Constable.
Q. Where were you guarding that prisoner?

A. Part of the evening at the Commercial and later in the evening at the Prairie Home.
Q. What time did you go with him to the Prairie Home?
A. Little before six.
Q. Where did you take him to?
A. To the little room north of the dining-room.
Q. Was it dark or light when you went over?
A. It was a little after sundown.
Q. When you went into the house what door did you go in at?
A. The front door.
Q. Who did you find inside there then?
A. The first man I noticed was Chris. Larsen.
Q. What was he doing?
A. Waiting on the table, I think.
Q. How many were in the room?
A. I could not say; the table was full and some standing round.
Q. What did you do with your prisoner?
A. I turned him over to Chris. Larsen.
Q. What did you do then?
A. I went out to the drug-store.
Q. What drug-store?
A. Copeland's drug-store; it was in the same block.
Q. Were you acquainted with Jack Woods?
A. No, sir.
Q. Ever see him before that evening?
A. No, sir.
Q. You saw him then?
A. Yes, sir.
Q. What time was it when you first saw him?
A. It was about two or three minutes before the shooting; it was in the neighborhood of six o'clock.
Q. Were the lamps burning?
A. Yes, sir.
Q. Who was sitting at the table when Jack Woods came in?
A. I did notice all that sat there; I noticed Benson, and I noticed Belmont and Simmerman; I did not know their names at the time.
Q. Look at this diagram (handing); which side of the table were they sitting at?
A. On the north side.
Q. And towards which end of the table?
A. Towards the east of the center of the table.
Q. Where did Simmerman sit?
A. To the west of the two.
Q. Belmont to the east of Simmerman?
A. Yes, sir.
Q. Did Simmerman sit between the west door and Belmont?
A. He sat right next to him.
Q. And towards the west door?
A. Yes, sir.
Q. You can't be mistaken?
A. No, sir.

Q. You are positive that your statement is correct?

State objects as improper and leading. Sustained. Defense except.

Q. What did Woods do when he came in?
52 A. He laid his hands on their shoulders.
Q. He came in the west door?
A. Yes, sir.
Q. What did he do to them?
A. He laid a hand on the shoulder of each. I understood this much; he told them to throw up.
Q. Did you hear him say anything more?
A. I did not here any more.
Q. Where did Benson sit?
A. He sat — I think he sat to the east of the two.
Q. He sat at the corner of the table?
A. Yes, sir.
Q. Where did Ladimus sit?
A. I don't know.
Q. When you left the drug store, and went into the room a second time, were Belmont and Simmerman still sitting at the table?
A. Yes, sir.
Q. Were they in there when you went in first?
A. Yes, sir; but not sitting down.
Q. Did you know the two men by sight?
A. One was taller than the other; Belmont was taller.
Q. Where was Kelly sitting?
A. I don't know as I noticed Kelly.
Q. Did you know Collins?
A. Yes, sir.
Q. Where was he sitting?
A. I can't say.
Q. State if you know whether or not Collins was a companion of Belmont and Simmerman.
A. No, sir; I know he was with them the day before some.
Q. Do you know where Collins lived?
A. In the southeast part of the county.
Q. Do you know how long he had been acquainted with Belmont?
A. No, sir.
Q. When you went in there and found them sitting as they were, did you see any shooting?
A. Yes, sir.
Q. Who did it?
A. Belmont.
Q. Did you see him shoot?
A. Yes, sir.
Q. Did you see his revolver?
A. Yes, sir.
Q. Would you know his revolver if you saw it?
A. It was a large revolver.
Q. Did you see him point it at anybody?

A. Nobody but Woods.
Q. Did you see Woods fall?
A. No, sir.
Q. See him stagger?
A. No, sir.
Q. Did you see Belmont shoot anybody?
A. I saw him shoot Woods.
Q. Where was Simmerman then?
A. West of Woods.
Q. How many shots did you hear fired?
A. Two.
Q. Did the lamps go out?
A. Yes, sir.
Q. What put them out?
A. The shooting, I think; both lights went out at the same time.
Q. When you went down from the drug-store — how long were you down there?
A. Two or three minutes.
Q. How far is it to the drug-store?
A. I could not say—perhaps 150 feet.
Q. When Jack Woods said to them to throw up, what did the parties do?
A. They slid their chairs away from the table, and he took his hands away from their shoulders and reached for his revolver, and it seemed to stick on something, and just as he got it out Simmerman caught hold of his hand and that turned his back round to the east.
Q. Who was behind him then?
A. Belmont.
Q. Had there been any firing then?
A. No, sir.
Q. Did Simmerman throw up his hands?
A. No, sir.
Q. Did you notice Belmont closely? Did he draw one or two revolvers?

State objects as leading. Sustained.

Q. State to the jury how many revolvers Belmont drew.
53 A. I did not see him draw any.
Q. Did you see any in his hand?
A. Yes, sir; one.
Q. Did you see any more than that?
A. No, sir.
Q. You can't describe that revolver at all?
A. It was a big, long one.
Q. When the first shot was fired what did you do?
A. I backed up to the north room and went in there.
Q. Who did you find in there?
A. A lot of fellows I did not know.
Q. Was your prisoner in there?
A. Yes, sir.

Q. Was he in there all the time up to that time?
A. Yes, sir.
Q. Who had charge of him while you were at the drug-store?
A. Larsen had charge of him then.
Q. Did you see anybody in the dining-room you knew?
A. No, sir.
Q. Did you see Goldsmith?
A. I did not see him.
Q. What hand did Belmont have his revolver in?
A. In his right.
Q. Do you know how he held it?
A. No, sir.
Q. Could you see how he made it go off?
A. No, sir.
Q. Did you hear Simmerman speak after the first shot?
A. No, sir.
Q. Did you hear Belmont speak?
A. No, sir.
Q. Or Woods say anything?
A. No, sir.
Q. Was Kelly in the room when you got back there the second time?
A. I don't remember.
Q. Was his wife there?
A. I can't say.
Q. Do you know who was sitting at the west end of the table?
A. I could not say now.
Q. You were a witness in this case before?
A. Yes, sir.
Q. A question was put to you like this; I state it to refresh your recollection—

State objects as improper and incompetent. Sustained. Defense except.

Q. Was this question put to you: "State to the jury if you saw Simmerman shoot?" And did you answer to that question, "No, sir?"

State objects as improper and leading. Sustained. Defense except.

Q. Do you know Mr. Bierbower, the then district attorney?
A. Yes, sir.
Q. You were sworn then?
A. Yes, sir.
Q. Did he put this question to you: "State to the jury if you saw Simmerman shoot?"

State objects as improper and leading. Sustained. Defense except.

Q. Did you answer: "No, sir; I did not?"

State objects as improper and leading. Sustained. Defense except.

Q. When you went back to the Prairie Home the second time from the drug-store, was the door shut or open?
A. It was shut.
Q. When you went in did you shut it?
A. I don't remember.
Q. Did you see Woods come in?
A. No, sir.
Q. When the first shot was fired, was the outside door shut?
A. I can't say.
Q. Did you see Simmerman shoot that night?

State objects as leading. Sustained. Defense except.

Q. Did you see him have a revolver in his hand that night?

State objects as leading. Sustained. Defense except.

Q. State to the jury all you saw Simmerman do in the room that night.
A. Nothing, only taking hold of Woods' arm.
Q. Did you see him shoot anybody?

State objects as leading. Sustained. Defense except.

Q. Did you see Collins after he was outside of the room?
A. No, sir.
Q. Do you know where he was shot?
A. No, sir.
Q. Do you know whether he was shot or not?
54 A. Yes, sir; I saw him after he was dead.
Q. Where was he shot?
A. Once, in the back.
Q. See any holes where bullets went in, or about the house after the shooting?
A. No, sir.
Q. You know Chris Larsen?
A. Yes, sir.
Q. Was he there?
A. I don't know.
Q. Did you see him in the room at the time of the shooting?
A. No, sir.

Cross-examination by Mr. MORLAN.

Q. When was the first time you saw Simmerman?
A. The day before about two o'clock.
Q. Were you out with him?
A. No, sir.
Q. What was he doing then?
A. When I first saw him, he came out from the Commercial Hotel, got on his pony, and rode off.
Q. Did he say anything?

A. I don't remember; he rode right down the street here, north.
Q. Where did you last see him?
A. Going up the street.
Q. That was in the afternoon, Sunday?
A. Yes, sir.
Q. What was he doing the next time you saw him?
A. I think he was on horseback.
Q. See Belmont too?
A. Yes, sir.
Q. Were they together?
A. Yes, sir.
Q. What doing?
A. Looking after their horses.
Q. What were they doing here in town?
A. They were looking after their horses.
Q. Where were they, the horses?
A. They were right down here, northeast of town.
Q. Did you hear them talk together?
A. Yes, sir.
Q. Tell what else you noticed.
A. I noticed Simmerman rode over the sidewalk.
Q. What else?
A. I noticed him trying to get on his horse, when in front of the Prairie Home, after the shooting.
Q. Where did you board then?
A. At the Commercial Hotel.
Q. Did you see either of them at the Commercial Hotel, or in the store of Abrahamson?
A. Yes, sir.
Q. When?
A. In the evening of Sunday.
Q. What were they doing there then?

Defense object, as incompetent.

By the COURT: For the purpose of proving their identity, it is allowed. Defense except.

A. They were buying something in the store.
Q. See any knives or revolvers in their hands then?
A. Not that I remember of.
Q. Hear them talk in there?
A. Yes, sir.
Q. Who was in there, besides you?
A. Well there were four of them.
Q. Did you hear this remark by one of them: "How do you like our Kansas toothpicks?"
A. No, sir.
Q. How many times did you see them from noon to the time you saw them in Abrahamson's store?
A. I don't know; I saw them round town.
Q. What called your attention to them?

A. Well their dress; they were dressed in cowboy fashion.
Q. Were they armed?
A. Yes, sir; pretty well armed.
Q. Notice anything peculiar about Simmerman?
A. Nothing, only his lameness.
Q. How long were they in the store of Abrahamson?
A. I could not say.
55 Q. Notice what they bought there?
A. No, sir; I don't remember now.
Q. What were you doing there?
A. Nothing in particular.
Q. Did you not go in there out of curiosity to see what they did?
A. That is about the size of it.
Q. Well, what did they do?
A. Well, they bought some stuff.
Q. What did they say?
A. They were having some fun.
Q. What time did you go over to the Prairie Home that night?
A. About six o'clock.
Q. Who went with you?
A. Hare.
Q. What did you do then?
A. I turned him over to Chris. Larsen.
Q. What did he do with him?
A. I don't know; I found him in that room on the north when I got back.
Q. Who was at the table then?
A. I can't remember; only these *two* men, Belmont and Simmerman and Benson.
Q. What called your attention to Benson?
A. I don't know; I was acquainted with him.
Q. You turned the man over to Larsen?
A. Yes, sir.
Q. He was waiting on the table?
A. Yes, sir.
Q. Do you know where Kelly sat?.
A. No, sir.
Q. Or Mrs. Kelly?
A. No, sir.
Q. Or where Ladimus sat?
A. No, sir.
Q. Did you see Mr. Burns there?
A. No, sir.
Q. The only persons you can locate *is* Benson and those two men.
A. Yes, sir.
Q. What did you do after turning over the man to Larsen?
A. I turned and went out.
Q. What did you say to Larsen?
A. I asked him if he would guard the man a few minutes while I went out.
Q. How long were you gone?

A. A few minutes.
Q. Fix the time as near as you can that you were gone.
A. I could not have been gone over 5 or 6 minutes.
Q. Were you acquainted with Kelly at that time?
A. Yes, sir.
Q. He was deputy sheriff at that time?
A. I believe so.
Q. Larsen was also deputy sheriff at that time?
A. Yes, sir.
Q. If you had seen Kelly there you would remember it?
A. Yes, sir; I think so.
Q. Remember seeing any woman at the table?
A. No, sir.
Q. Where were Belmont and Simmerman as you went in first—where did they sit?
A. They were standing up near the west door; I went by them.
Q. Which was the east and which was the west?
A. I did not notice how they stood.
Q. When you came back what was the first thing you noticed?
A. I saw Jack Woods lay his hand on their shoulders.
Q. Was that the very first thing?
A. I presume the first thing was the people at the table.
Q. Well, what was the first thing you clearly saw?
A. I remember Jack Woods walking ahead of me.
Q. Did he have his hat on?
A. Yes, sir.
Q. Notice anything else about him?
A. No, sir.
Q. Did you know who he was?
A. Yes, sir.
Q. Did you talk with him before that?
A. Yes, sir.
Q. What did he say?
A. He said he was a sheriff.
Q. Did you have any arms?
A. I had a little revolver, 32 calibre.
Q. Describe what you saw Jack Woods next do.
A. When he got to the men he walked right between them and laid his hands on their shoulders, and the only thing I heard him say was "Throw up."
Q. Did he not say first, "Boys, consider yourselves under arrest?"
A. I don't remember now.
56 Q. Did you notice anybody follow you in?
A. No, sir.
Q. The first time you were there these boys had not sat down?
A. No, sir.
Q. The next time you followed Jack Woods, right behind the men?
A. I followed Jack Woods, but not behind the men.
Q. You came in at the door in the west?
A. Yes, sir.

Q. How did the table sit in regard to the door?
A. It was to the right as I went in—that is, to the south.
Q. There was just room enough to pass in behind the chairs?
A. A little more room than that.
Q. You went as far as the door in the north side of the room?
A. Yes, sir.
Q. Then he put his hands, one on Simmerman and the other on Belmont?
A. Yes, sir.
Q. What next?
A. They slipped back from the table and faced each other.
Q. What then?
A. Woods tried to draw his revolver and then Simmerman caught Woods' hand.
Q. How close was Woods to you?
A. 5 or 6 feet.
Q. After Simmerman caught his hand what then?
A. Simmerman turned his hand to one side.
Q. They slipped back just as he stepped back?
A. Yes, sir.
Q. Notice either of them throw up his hands?
A. Yes, sir; Simmerman did just a little.
Q. Was that before Woods took his hand off his shoulder, or afterwards?
A. It was afterwards.
Q. He did not throw up his hands when Woods put his hand on his shoulder?
A. No, sir; not until Woods stepped back. He did not do it right away.
Q. At that time what did you notice Belmont do?
A. Not anything then.
Q. How many shots did you hear fired there that evening?
A. I think only three in the room; the first two were close together; then a little after another one was shot.
Q. Illustrate to the jury how quick they were (witness does so by striking his hands together); then how long before the third shot.
A. I don't know; I had got into the other room to look after Hare.
Q. When did Simmerman catch Woods' hands?
A. Just as Woods got his revolver out, and he turned it back over his shoulder.
Q. What position was Woods in then?
A. Back to the east, facing the west.
Q. The third shot, you don't know who fired that?
A. No, sir.
Q. Who fired the first?
A. Belmont.
Q. Who the second?
A. Belmont.
Q. Who the third?
A. I don't know; I was in the north room then.

Q. How long did you stay in that north room?
A. Until the shooting was over.
Q. Did you look out of the window?
A. Yes, sir.
Q. Did you see this man out there?
A. I saw Simmerman trying to untie his horse, and he shot, I think, three times towards the door.
Q. Hear him say anything while shooting?
A. No, sir.
Q. What was Belmont doing then?
A. I don't know.
Q. You are sure it was Simmerman you saw shooting at the door?
A. Yes, sir.
Q. Anybody else looking out with you?
A. I don't know; there were quite a number in there.
Q. See Dr. Hollenbeck in there?
A. I don't remember.
57 Q. See Hare in there?
A. Yes, sir; he was coming toward the door.
Q. Was the door open?
A. Yes, sir.
Q. You backed toward the door as soon as you heard the first shot?
A. Yes, sir.
Q. These men were not at the table before you went down to the drug-store?
A. They were not.
Q. You were sworn in this case when it was tried before?
A. Yes, sir.
Q. State if at the former trial of this case you were not asked by a juror this question: "Were these men, Belmont and Simmerman, at the table when you went down to the drug-store?" And you said, "Yes, sir." Did you swear that way?
A. I don't know.
Q. Would your memory be as good [as] then?
A. I should think so.
Q. Were you not asked by Mr. Hamer, on the former trial, this question: "Do you remember any person that was at that table?" And you said, "No, sir."
A. I don't know whether I swore to that or not.
Q. Were you asked this by Mr. Hamer: "Do you remember of seeing a single person in that room besides Woods and these two men?" And you said, "No, sir."
A. I don't know whether I swore to that or not.
Q. You would not swear that you did not swear that way before?
A. No, sir.
Q. Have you not stated to people in this town, since the other trial, that you were not certain how these men sat?
A. No, sir.
Q. You remember now that when you went down to the drug-store they were standing up?

A. Yes, sir.
Q. And you know now that you followed Jack Woods right up as far as that north door?
A. Yes, sir.

By Mr. BURR:

Q. Do you know what the business of Belmont and Simmerman was here?
A. I can't say; they had some horses here.
Q. What were they doing with the horses?
A. They were herding them outside the town.
Q. Were they offering those horses for sale here?
A. Yes, sir.
Q. State whether or not Simmerman was working for Belmont?
A. I don't know.

T. B. GOLDSMITH called and sworn.

Questioned by Mr. BURR:

Q. Were you a resident of this county last October?
A. Yes, sir.
Q. Were you acquainted with the hotel called the Prairie Home then?
A. Yes, sir.
Q. Were you present at that place on October 16th, 1882?
A. Yes, sir.
Q. Did you know the men called Belmont and Simmerman?
A. I saw men in there that were called by that name?
Q. Describe them.
A. One was dark complected and the other light.
Q. One had a club foot?
A. Yes, sir.
Q. Did you see them in there that night?
A. Yes, sir; about six o'clock; they were sitting at the table eating supper?
Q. Describe how they sat.
A. On the north side of the table.
Q. Which one was sitting to the east?
A. Belmont.
Q. Which way from him did Simmerman sit?
A. On his right, towards the street.
Q. Did you know Jack Woods?
A. Yes, sir.
Q. As he went in, were they sitting as you have described?
A. Yes, sir.
Q. Did you pay any attention to them to know how they were sitting?
A Yes, sir.
Q. Sure of it?
A. Yes, sir.
Q. Had you heard anything that took you up there?

58 A. I heard they were going to take the boys in, or try to.
Q. What did you hear Woods say?
A. Nothing; I was not close enough to hear; I was standing on the sidewalk.
Q. Was the door open?
A. Yes, sir.
Q. Can you give the size of that door?
A. Perhaps three feet and a half wide, and six feet high.
Q. Did you see Woods go in?
A. I don't remember about that.
Q. Did you see Woods stand behind them?
A. Yes, sir.
Q. What did you see Woods do?
A. He laid his hands on their shoulders, and I got away then.

Cross-examination by Mr. MORLAN:

Q. You were acquainted with them, then?
A. No, sir; I had seen them; I knew them by hearsay; I saw them the day before also.
Q. What do you mean by hearsay?
A. I had heard them called by name.
Q. You did not know them by sight?
A. Yes, sir; I had seen them round town; I saw them in the harness-shop getting some bridle reins fixed.
Q. You looked in at the door?
A. Yes, sir.
Q. Was the table full?
A. Yes, sir.
Q. How did that table sit, in regard to the door?
A. I sat south of the door.
Q. Then, as you looked in you looked along that line of men at the table?
A. Yes, sir.
Q. You were watching Woods make the arrest?
A. Yes sir.
Q. Woods passed right along that open space behind the people at the table?
A. Yes sir; there were others standing there.
Q. Anybody between you and Woods?
A. No, sir.
Q. Did you hear a word said by anybody?
A. No, sir; Woods laid his hands on their shoulders, and they swung round, and I did not stop any longer.
Q. When you left, where did you go?
A. To the north.
Q. Did you see Sheriff Ericson?
A. No, sir.
Q. Meet him there anywhere?
A. No, sir.
Q. All you saw was just their swinging round?
A. Yes, sir.

Q. What did Woods do?
A. He pulled his right hand back.
Q. What did you do then?
A. I went north.
Q. Where to?
A. Behind the bank.
Q. Did you see any shooting?
A. No, sir; I heard it.
Q. You did not see a shot fired?
A. No, sir.

T. J. COURTNAY called and sworn.

Questioned by Mr. BURR:

Q. Where did you reside a year ago this month?
A. In Minden.
Q. Were you acquainted with the Prairie Home on the 16th of October, 1882?
A. Yes, sir.
Q. Do you remember the night of the shooting?
A. Yes, sir.
Q. State if just before the shooting of Woods you had any intimation of what was going on.
A. Yes, sir.
Q. Where did you start from to go there?
A. From the court-house.
Q. Did you go over there?
A. Yes, sir.
Q. Where did you go to?
A. Straight towards the bank first, then to the Prairie Home.
Q. Where did you stop?
A. I went up between the two corners, just of the sidewalk, 8 or 10 feet from the building.
Q. Was the west door open when you got there?
A. Yes, sir.
Q. Who did you see in there?
A. I saw Simmerman and Belmont; I did not know them by name then; I had seen them the day before.
Q. Did you know them apart?
59 A. Yes, sir; one was lame, called the Mexican; the other was taller and lighter.
Q. Where did they sit that night?
A. On the north side of the table; Belmont sat farthest east and Simmerman sat to the west of him.
Q. Are you mistaken about this?
A. No, sir.
Q. Was there anything to obscure your vision?
A. No, sir.
Q. Did you see Jack Woods?
A. I saw him going in the door.
A. See him go up to them?

A. Yes, sir; he put his hands on their shoulders; they kind of shoved aroung and raised up.

Q. On which side of Jack Woods was Simmerman?

A. Simmerman was between Woods and myself.

Q. What did you do then?

A. I still staid there; they were all three in a row; Simmerman stood in the way of my seeing.

Q. How long did they remain in that position?

A. A very short time; then I heard the reports of two shots.

Q. See who fired them?

A. No, sir.

Q. What occurred then?

A. I think the lights went out then, and they seemed to make a start for the door.

Q. Previous to that did you see Sheriff Ericson go in the door?

A. Yes, sir.

Q. Did he shut the door?

A. I think he did partially shut the door.

Q. Did he meet anybody there?

A. He met Simmerman there and they had a slight scuffle.

Q. What did you do then?

A. I backed off to the west and south.

Q. What become of Ericson and Simmerman?

A. Well, Ericson had Simmerman down right in the door; then Simmerman run out, and went south of the pony, and then got on to the north side of the pony.

Q. How do you know it was Simmerman?

A. He was lame.

Q. What did he do?

A. His pony got away and he started after him; Mr. Leach was coming down the street, and Simmerman said: "You damned son of a bitch, stop that pony." Leach sort of headed it off, and Simmerman got it and tried to get on, and I thought the saddle turned; he fell on the ground, but he finally got on and rode away.

Q. Did you see Belmont come out?

A. Yes, sir; he ran to his horse before Simmerman got his untied; he went up the street and fired some, I think.

Q. Who got onto his horse first?

A. Belmont did and went north nearly opposite the hardware store, and turned and rode back.

Q. How many times did he shoot on that trip?

A. I should say 4 or 5 times.

Q. Locate the spot, as near as you can, where Simmerman got onto his horse?

A. I think nearly in front of Van Hise's.

Q. How far south of the hotel is that?

A. It is southwest; not quite half way to the Commercial Hotel.

Q. What did they do when they both got on their horses?

A. They rode out of town.

Q. What was the language of those parties or either of them.

A. All I heard was what Simmerman said to the man that stopped the pony, as I have stated.

Cross-examination by Mr. MORLAN:

Q. What is your business here?
A. In the livery business.
Q. How long in that business?
A. Two months.
Q. You had seen them before that day?
A. Yes, sir; Sunday afternoon, at the Commercial Hotel, about two o'clock; they came in there to dinner.
Q. You don't know whether they got dinner there at all.
A. No, sir.
Q. Where did you next see them?
A. In the evening, down in front of the drug-store.
60 Q. That was Sunday evening?
A. Yes, sir.
Q. See them at any other place on Sunday?
A. No, sir.
Q. How long did you see them at the Commercial Hotel?
A. Very short time.
Q. Then when next did you see them after Sunday?
A. Monday; I went away Monday morning; in the evening I saw Simmerman there coming in from his ponies.
Q. Hear him say anything at that time?
A. He said he got the ponies from Southern Colorado.
Q. That was all he said?
A. Yes, sir.
Q. When next did you see him?
A. At the supper-table.
Q. Where were you when you heard there was going to be some fun?
A. I did not hear that; Ericson told me that there was going to be an arrest.
Q. Were you sheriff, deputy sheriff, or constable?
A. No, sir.
Q. Did you go down from here alone?
A. Ericson went downstairs with me.
Q. Where did you go?
A. I went across the street and Ericson went out here southwest to the stable; I went across to the bank and saw Leach, Green, and Goldsmith there; and I said, "I think there is going to be some fun."
Q. Did they stay with you to see the fun?
A. Goldsmith went along and stood looking in at the door; he stood on the north side of the door.
Q. Was the door wide open?
A. No, sir.
Q. What direction were you from him?
A. I was rather back of him or west of him; he stood right in front of me; I was south of his right side; I was off the sidewalk, standing on the ground.

Q. You was looking right in to see what was going on?
A. Yes, sir.
Q. Anybody go in behind him—that is, behind Woods?
A. Ericson went right in and somebody else followed right in; I don't know who it was.
Q. Did Woods leave the door open?
A. Yes, sir; part way open. It was two-thirds the way open.
Q. When Ericson went in did he shut it?
A. No, sir.
Q. Did he open it any wider?
A. I did not notice that he did.
Q. Then Ericson went in before the fellows moved back?
A. Just about the time they were shoving back.
Q. When Woods went up and placed his hands on them, they turned facing each other; then they raised up?
A. Yes, sir; that made all three in a line.
Q. Woods was going in as you went there?
A. Yes, sir; just going in the door.
Q. You saw him walk right down that opening?
A. Yes, sir.
Q. What did you see done there?
A. I could not see anything done.
Q. Simmerman stood between you and Woods; you could not see what was done?
A. No, sir.
Q. You could not see the hands of either one of them?
A. No, sir.
Q. Where was Ericson then?
A. He went in about that time.
Q. Then what?
A. Two shots were fired; he started in as they began to shove back from the table.
Q. You heard two shots fired?
A. Yes, sir.
Q. And at the last one the lights went out?
A. Yes, sir.
Q. You could not see what they were doing, but they stood there as the lights went out?
A. Yes, sir.
Q. What next?
A. I saw Simmerman and Ericson coming out tusseling; Ericson got Simmerman down in the door.
Q. Any shots come towards you?
A. No, sir.
61 Q. Where did you go to?
A. Over to the Commercial Hotel.
Q. Who did you first meet there?
A. Mr. Gordon.
Q. Who did you first tell about this matter—that is what you saw?
A. I think I first made an affidavit to Mr. Stewart about it last fall

Q. Why did you do that?

A. Well, there was some talk among the people that sheriff Ericson was in Van Hise's cellar.

Q. There was such talk, then, that he was in the cellar?

Defense except, and move to strike out the question, and also the previous one, as immaterial and improper.

Sustained as to the last question. State excepts.

Q. You would not have told this story except to help him out?

A. No, sir.

Q, You and Ericson were good friends, were you not?

Defense object as immaterial. Overruled. Defense except.

A. I suppose we were.

Q. What business were you in at that time?

A. Working for Robinson & Tuttle.

Q. Ericson is the man that told you about this fuss first—that there was going to be one?

A. No, sir; I had been over to the railroad and was telling him about what the agent had told me at Kearney, and he said he knew it, that Woods was here.

Q. You were at one time Ericson's deputy?

A. I was.

By Mr. BURR:

Q. You spoke of a man you met down here that night by the name of Green, what is his full name?

A. William Green.

Q. Where is he now?

A. At Summitville, Southern Colorado, Rio Grande county.

The court here again admonishes the jury, on separating, under the statute, and takes a recess for supper.

FRANCIS HARE called and sworn.

Questioned by Mr. BURR:

Q. Where were you on the 16th of October, 1882, about dark?

A. I was here in Mindon, at the Prairie Home; the man that was with me was George Smith; we were at the Commercial Hotel—went there to get supper.

Q. Up to that time, had you seen Simmerman?

A. Yes, sir.

Q. And Belmont?

A. Yes, sir.

Q. Had you seen them enough to distinguish them one from the other?

A. Yes, sir.

Q. Did you see them at the Prairie Home?

A. Yes, sir.

Q. Where were you?

A. In the north room; I went there with George Smith for supper, from the Commercial Hotel.
Q. He had you on the charge of stealing horses?
A. Yes, sir.
Q. You were in the north room?
A. Yes, sir.
Q. When you went into the dining-room what did you see?
A. The table was full; we could not get any seats.
Q. Did you see Belmont and Simmerman there then?
A. Yes, sir.
Q. Which side of the table?
A. On the north side.
Q. Where did Belmont sit?
A. He sat at the east side and Simmerman sat next to him, on the west.
Q. Did you see a person that you afterwards learned was Jack Woods?
A. Not there; no, sir.
Q. Did you see any shooting that night?
A. Yes, sir, but not in that room; I saw Belmont, I think it was him, outside at a post.
Q. There was a window looking out of that north room?
A. Yes, sir. Yes, sir, I saw Belmont, as I thought, getting on his horse; he had a revolver in each hand.
62 Q. Did he shoot it off?
A. Yes, sir; several times.
Q. Hear him say anything?
A. Yes, sir; but I can't remember what it was now.
Q. Did you go out into the dining-room after the shooting occurred?
A. Yes, sir; right away afterwards.
Q. Did they light a lamp there?
A. There was a light when I went out there.
Q. How long after the shooting did you go out there?
A. I can't say, the shooting was very quick- done.
Q. Who did you see out there?
A. I saw Kelly—I found afterwards it was him—lying as I stepped out, just right out of the door that I went out of; his head was about a foot west of the door; his feet laid out to the door that led out onto the sidewalk; I held up his head.
Q. Who else was there?
A. I saw his wife there.
Q. See Jack Woods there?
A. No, sir.
Q. You are positive that Belmont sat at the east end of the table?
A. Yes, sir.

Cross-examination by Mr. MORLAN:

Q. Who did you go over there with?
A. George Smith.
Q. You are kept here now at the request of the defendant?

A. I don't know.
Q. You have been convicted of horse stealing?
A. I guess so.
Q. Don't you know so?
A. I suppose I have.
Q. When did you first see Simmerman?
A. First on Sunday; I came here on that day.
Q. Who went over to the Prairie Home with you?
A. George Smith.
Q. Where did he take you to?
A. He came there with me and spoke to Larsen.
Q. What was Larsen doing?
A. He was waiting on the table.
Q. What did Larsen do with you?
A. I went right into that little room.
Q. What did you do in there?
A. I staid in there and was talking to some men in there.
Q. You were not expecting a row?
A. No, sir.
Q. What was the last you saw of Smith?
A. He went out; I heard him talking with Larsen and he went out.
Q. You went right into that room?
A. Yes, sir; I went in to wash.
Q. Were not the men, Belmont and Simmerman, sitting down as you went in?
A. Yes, sir.
Q. Then Smith was mistaken about that?
A. He must have been.
Q. What called your attention to them?
A. I had seen them on the street that day.
Q. Who else did you see at the table?
A. I saw Mrs. Kelly and Mr. Kelly.
Q. Who else?
A. The two cowboys; those were all I remember.
Q. You walked in ahead of Smith?
A. I don't remember.
Q. You do remember how they sat?
A. Yes, sir.
Q. Why do you remember that?
A. because one was a very light-complected man and the other dark.
Q. You have heard that stated in the court-room here several times?
A. Yes, sir.
Q. You were in the north room when the first shot was fired?
A. Yes, sir; I was standing close to the door; several men crowded in; I wanted to look out to see what was going on; Smith came in and, I think, a doctor.
Q. Who first came in?
A. I could not say.

63 Q. You started for the door; don't you know who came in first?
A. I think Smith, but can't say positively.
Q. How many shots did you hear?
A. Two or three.
Q. Not more than three?
A. I don't think more than three in that room.
Q. Did Smith go into that room with you when you first went in?
A. I don't think he did.
Q. Remember when you went to the door of the Prairie Home; was the door open?
A. I could not say.
Q. Then after the firing you went to the window and looked out?
A. Yes, sir.
Q. Who stood there with you?
A. Not anybody that I remember of.
Q. See anybody shooting outside?
A. Yes, sir.
Q. Shooting in what direction?
A. Right towards the door.
Q. After you went in, remember whether you shut the outside door?
A. I don't remember.

Mrs. MARY ROBINSON called and sworn.

Questioned by Mr. BURR:

Q. Where did you live about the 16th of October, 1882?
A. Opposite the Commercial Hotel, in this town.
Q. Remember the shooting that took place on that night?
A. I do.
Q. See any part of it?
A. No, sir; I saw the boys after they got through firing, on the street.
Q. Did you hear the firing in the house before you saw them on the street?
A. Yes, sir; I heard the firing distinctly.
Q. Where did you go?
A. I went to the north door of my house, and looked up that way.
Q. How far is your house from the Prairie Home, south?
A. There are several houses between.
Q. Half a block?
A. Perhaps so.
Q. State if you had seen these men before.
A. I saw four of them going past before, during the day.
Q. Did you know how to distinguish this man here from the others?
A. No, sir.
Q. Did you know on that night how to distinguish them by lameness?
A. No, sir; I went to the door; I saw a man limping; I supposed

he was shot; some one shouted for some one to stop his horse; soon after I saw them drive by my house; I heard one say to the other—he said, "Oh, what did you do that for?" and the other said—spoke up quick—"There was no other way to get out of it." I went into the house and said that something dreadful had happened, and they were sorry for it.

Cross-examination by Mr. MORLAN:

Q. You could not tell one from the other?

A. No, sir; the first voice sounded like a boy of nineteen or twenty.

Q. You could tell from the voice his age?

A. Yes, sir; I think so.

Q. Where were these boys then?

A. Between the Commercial Hotel and our house; they were on horseback; the horses were going very fast at that time—not on the run—but they were using the whip then.

Q. They were using the whip?

A. I should judge so; I went to the north door first; they were on the ground then, and then I went to the south door, and they were on their horses; I stood at the north door and could see the whole street; one was on the ground limping then, trying to get on his horse; I went to the south door and they were riding by then; when I was at the north door one was on horseback, and the other limping round; I left that door and went to the other door to see the direction they took, and they had just come out between our house and the Commercial Hotel.

64 Q. How long is the main part of your house?

A. It is about 16 by 18 feet, I guess; I don't know.

Q. This man that you heard make this remark, where was he?

A. He was travelling—nearer my house than the Commercial Hotel.

Q. Light enough then for you to see anybody distinctly?

A. Yes, sir; quite so.

Q. You heard some one say, "Oh, what did you do that for?"

A. Yes, sir; it sounded as any young man 19 or 20 would speak if they were excited.

Q. Where were you standing as you heard that remark?

A. Out on the door step, on the south side of the house.

Q. You heard some shooting?

A. Yes, sir; quite awhile before. It was when I stood at the north door; some one was on horseback, and he was firing his revolver, and I heard some one say, "Stop that horse."

Q. Those were just the words he used?

A. Well, I heard him say something about stopping his horse.

Q. Did it sound like a young person excited?

A. No, sir; not at that time.

Q. Did it sound like a man that was wounded, that made the remark as they rode away?

A. It sounded like a man that had done something that he was sorry for; I made the remark to my family after I went in.

Q. Who did you tell it to?
A. Miss Fetz was there.
Q. Who else did you make that remark to?

Defense object as immaterial and incompetent. Overruled. Defense except.

A. I don't know as I ever mentioned it out of the house to any one; I don't know as I ever mentioned it until after he was tried before; then I said I believed he was sorry for the shooting.
Q. After the other trial [to] whom did you first tell it?
A. I don't know.
Q. Have you not told others that you were not certain that you heard it?
A. No, sir; when I hear anything I hear it.
Q. This shooting has been talked of?
A. Yes, sir.
Q. You don't remember of any one that you told it to outside of your family?
A. I am talking to you now about it, which is the first time I ever told it in public.
Q. Who outside of your family, besides this time?
A. No one; Miss Maud Fetz was there at that time.
Q. Where is she?
A. In the house here, I think.
Q. She was the only person you mentioned it to?
A. Yes, sir.

MATHIAS SIMMERMAN called and sworn.

Questioned by Mr. BURR:

Q. Are you the defendant here?
A. Yes, sir.
Q. Where were you born?
A. In New Jersey.
Q. When?
A. 1863, February 14th.
Q. How long did you live there?
A. I can't recollect; my father brought me away when small.
Q. Where did you move to?
A. To Kansas—the southern part.
Q. What was your father's business in Kansas?
A. When he first came out he farmed a good deal; then went to cattle raising.
Q. Where did you live up to the time you were 16 or 17 years old?
A. In the southern part of Kansas, I think, until 1870; the grasshoppers ate them out there, and we moved to the northern part—to Graham county.
Q. How far from the Nebraska line?
A. One county between it and Nebraska.
65 Q. How far is that from Arapahoe, Nebraska?
A. About 95 miles, I suppose.

Q. How long did you live there?
A. About seven years, I think.
Q. What doing there?
A. Father farmed a good deal and had some cattle.
Q. You with your father all the time?
A. Yes, sir; I left about 4 years ago, I think.
Q. Where did you go from there?
A. To New Mexico.
Q. Who — working for there?
A. I worked for two or three firms; I worked for the Prairie Cattle Company.
Q. Who were in that firm?
A. I don't know the names; they were Englishmen; they had 150,000 cattle; Humphrey was the head boss.
Q. What other company?
A. The Pilo Blanca Cattle Company; Woolworth, of Omaha, was one of the head men.
Q. How long did you work for him?
A. Fifteen months.
Q. When did you quit working for him?
A. The 4th of August, 1882.
Q. Then it was Woolworth, of Omaha?
A. Yes, sir.
Q. What initials?
A. W. C. Woolworth, I believe.
Q. And J. M. Woolworth was his brother?
A. I think so.
Q. Where were you in May and June of that year?
A. I was in New Mexico.
Q. Will Woolworth's books show that?
A. Yes, sir; I was driving 15,000 head of cattle then; then I went to Fort Dodge, Kansas, and went to my father's.
Q. How long did you stay there?
A. About three weeks.
Q. What did you do then?
A. I went in with a fellow called Dick Belmont; he and a fellow named Burbel came to our house about the first of October, 1882.
Q. Did you go away with them?
A. Yes, sir.
Q. Where?
A. On the frontier of Kansas.
Q. What for?
A. To break a bunch of horses; I hired out with him at $40 a month.
Q. How long did you work for him before coming to Minden?
A. Little over two weeks.
Q. Ever see him before he came to your father's house on the first of October?
A. No, sir.
Q. Ever heard of him?
A. No, sir.

Q. When you came to Minden, when did you get there?
A. I believe the 15th of October, 1882.
Q. Where did you and Belmont stop?
A. Four of us, Bert Perryman, Jim Burbel, Belmont, and I ate two meals at the Commercial Hotel and two at the other place.
Q. Where did you find the other two men?
A. They were strangers to me; they helped us bring them horses up here.
Q. Where did you first put up?
A. To to this upper hotel, the biggest one.
Q. How long did you stay there?
A. We came there and got dinner Sunday, I suppose between one and two; ate supper there and breakfast there, then came down here to the Prairie Home.
Q. When you went in there to eat supper what did you do?
A. Sat down to the table.
Q. What hour?
A. Between six and seven, I suppose.
Q. Know any person in that room?
A. Only one man by sight; that was Belmont.
Q. How old was Belmont?
A. Past his 27th year; I don't know when his birthday was.
Q. How tall was he?
A. I could not say.
Q. What would he weigh?
A. I don't know.
66 Q. What is your judgment?
A. He would weigh about 160 pounds.
Q. How old are you?
A. I am in my 20th year now.
Q. How tall are you?
A. I did measure, but I have forgotten; I was measured down to the pen.
Q. How much do you weigh?
A. I did weigh 120 down to the pen.
Q. Did you form any acquaintance with Belmont's ability to shoot?
A. I saw him shoot several times, at different objects.
Q. See the arms he carried?
A. Yes, sir.
Q. Is that (handing witness a pistol) the pistol he carried?
A. Yes, sir.
Q. What size is it?
A. 45 calibre.
Q. What weight powder does it carry?
A. Sixty grains.
Q. What make?
A. Colt's.
Q. Will it stand cocked?
A. No, sir.
Q. Why?

A. The notch- is filed off.
Q. Who did it?
A. He said he filed them off.
Q. Why did he say?
A. I don't know.
Q. He fired by calculation and not by aim?
A. Yes, sir.
Q. See him fire at what?
A. At an antelope, 150 yards away, with this.
Q. What result?
A. The antelope died.
Q. What else?
A. At a jack-rabbit.
Q. What result?
A. It was nearly cut in two.
Q. Where was that?
A. 75 yards off, running.
Q. What else?
A. A rattlesnake that was just shooting down from his horse—8 or 10 feet.
Q. Did he hurt the rattlesnake?
A. He shot his head off.
Q. When you went into this supper, who had that revolver?
A. Dick Belmont.
Q. What kind did you have?
A. 38 and 34; very heavy-barreled.
Q. Did he have another revolver with him?
A. He had four.
Q. What was the size of the others?
A. Another like that one and two common 44 bulldogs in his coat pockets.
Q. Were you acquainted with Collins?
A. No, sir; not at all; when they were bringing me up here they said it was the boy that was carrying the mail.
Q. Had he made arrangement to work for Belmont?
A. Dick said, "I have got a man to go with me"; he was to take my place in another day.
Q. What understanding had you with Belmont to quit working for him in a few days?
A. Well, I had all the horses broken; had them all so they would ride; I told my father I would be back in two weeks, and they were overrun when I got here.
Q. Where did you sit at the table over here that night?
A. On the right hand side of Belmont, on the north side of the table.
Q. Where did Belmont sit?
A. On my left, on the north side of the table, next to me.
Q. Know who else sat at the table?
A. No, sir; all strangers to me.
Q. While you were eating supper there, what occurred?
A. A little shooting. A man came in and laid his hands on our

shoulders, and laid them there half a minute before speaking; he said, "Well, boys, consider yourselves under arrest," and threw his six shooter in my face and said then "Don't you move." I threw up my hands, and then I caught a bullet under my left arm.

Q. As you held up your arms which way did you face?

A. To the south.

Q. What shirts did you have on?

A. I have on one of the shirts now, and the sheriff has two of them.

Q. Was your person hit by the bullets?

A. Yes, sir; and bled some.

67 The witness here shows to the jury the hole in the shirt he has on, a colored checked shirt; the hole is in the left side, in the breast of the shirt, about opposite the under part of the sleeve. Witness also points to what he calls a scar on his left breast, about two inches above the left nipple, which I can hardly distinguish.—Reporter.

Q. How many shirts did you have on that night?

A. Three; there was a red shirt and a white one, besides this one I have shown.

Q. What became of the other two?

A. Warden Nobes gave them into Sheriff Ericson's hands.

Q. Was anything in your pockets?

A. In my coat pocket I had a pocket-book and lots of photographs.

Q. What became of it?

A. I threw it away as I went south, I did not think it was worth anything; it was all shot to pieces.

Q. Who shot you?

A. Dick Belmont; he said so afterwards, because I threw up my hands.

Q. Do you know who shot Collins?

A. Dick Belmont, I think; I saw him draw a revolver, and he fired it.

Q. What did you do when you were shot?

A. I staggered over against the table, and Dick stepped back by the door; Jack Woods stood there between us; Belmont fired and shot Woods, and then turned and shot me; then I staggered out towards the door.

Q. What door?

A. The west door.

Q. Who did you meet?

A. I don't know; I met a man at the door and he grabbed hold of me and threw me down.

Q. Did you know Sheriff Ericson of this county?

A. I never saw him until he came down after me at the pen.

Q. What did you do then?

A. I run out and tried to get my poney, and he broke loose; he run out near the Commercial Hotel and I followed it.

Q. When you held your hands up and received the shot across your person, did you not draw out your own revolver?

A. Yes, sir.

Q. What one?
A. I think the 38.
Q. Did you fire it off?
A. I don't know; I just grabbed it, and held it up, and if it went off, there was a hole up in the corner of the room.
Q. Did you shoot Jack Woods?
A. No, sir.
Q. Did you intend to?
A. No, sir; I did not intend to shoot anybody.
Q. Did your revolver go off?
A. I don't know whether it went off or not; there was a blaze right up in my face, and it blinded me with powder, and I don't know whether mine went off or not.
Q. When you went outside the door did you get right onto your horse, or state how long before you got your horse?
A. I suppose it was a minute; Dick rode up and down, and I think he shot, and then my pony came towards me.
Q. Did you get onto your horse
A. Yes, sir; and went south or southwest, up round that building.
Q. Where did you go?
A. Went south.
Q. How far south?
A. I suppose it is about 500 miles straight, or about 700 miles by the road; we went to the southern part of Kansas, pretty near over the line, into the Cherokee Nation.
Q. What did you do there?
A. Had another fight.
Q. Who with?
A. All strangers to me.
Q. What part did you take in it?
A. None at all.
Q. Where were you and Belmont stopping that night?
A. At the Point of Rocks, at a big cattle ranch on the Cherokee Nation line; there were four fellows up to the stable; those four fellows had the day before slipped round and got into the stable. We staked our horses out, and when we got up—there were 150 horses, they were feeding on corn—Dick looked out and said our horses were loose, and went to get them; I turned round, and
68 some men came in the door into the room.
Q. Where next did you see Belmont?
A. There were four fellows at the ranch; they came in and said something was the matter with my partner, and told me to surrender; I did and went out or looked out and saw Belmont; he was out there dodging bullets.
Q. How many times did they shoot at him?
A. Nine times.
Q. Where did they hit him?
A. In the heart. He stood there facing them; had that revolver here in his hand; he was hit right in the breast; he turned on his heel and brought his hands together, holding them up (witness illustrates), and fell right over on his face and knees.

Q. What makes that place on that revolver (pointing to a bent place on the revolver)?

A. That is bent by pounding horses over the head when they balk.

The revolver above indentified is here offered and introduced in evidence by the defense.

Q. Belmont was killed?

A. Yes, sir.

Q. You were brought back here for trial?

A. Yes, sir.

Q. What became of the other two men, Jim Burbel and Bert Perryman?

A. They were taken down to Kansas and tried and turned loose.

Q. When you came out of this Prairie Home did you have any difficulty, after you caught your horse, in getting on?

A. I had some difficulty; she balked with me and the saddle turned; I had only ridden the horse three times.

Q. It had never been ridden but three times?

A. That was all.

Q. As you rode out of this town, do you remember whether you said anything to Belmont or not?

A. Yes, sir.

Q. What did you say?

A. I asked him what he shot for; he said there was no other way to get out of it.

Q. When you entered the employment of Belmont, did you know anything about the horses that you were to break?

A. I never knew nothing about them.

Q. Know where they came from?

A. Yes, sir; the southern part of Kansas or about the middle way of Kansas.

Q. Why do you think so?

A. Well, they came from Texas horses.

Q. Had never been broken?

A. Some had—8 or 9.

Q. How many in all?

A. About thirty.

Q. Were they branded?

A. Yes, sir.

Q. How?

A. They had a half box on the hip.

Q. Did they not have a brand on the thigh?

A. No, sir; except Spanish brands, and no American can read them.

Q. The only American brand was a half box?

A. Yes, sir.

Q. And that was where?

A. On the hip.

Q. Whose brand was that?

A. It was a Texas brand.

Q. What is a brand?
A. They take an iron and burn it until the hair is all off.
Q. They register them same as a deed?
A. Yes, sir.
Q. Do you know whose brand that was?
A. No, sir.
Q. What is the difference between a registered brand and a trail or road brand?
A. They don't register a trail or road brand.
Q. Do you know anything about a brand called a "Lazy L" brand?
A. No, sir.

Cross-examination by Mr. MORLAN:

Q. You were born where?
A. In New Jersey.
Q. Where did you go from there?
A. To Kansas.
Q. How old were you when you got to Kansas?
A. I think about five years.
Q. Do you remember about the trip?
A. Yes, sir.
Q. How did you go?
A. I remember coming up the Mississippi river; the cars came that far.
69 Q. What part of Kansas did you go to first?
A. We went to Leavenworth; from there to Kansas City.
Q. How long did you stay there?
A. I don't remember.
Q. Where then?
A. South of Fort Scott.
Q. How far is Fort Scott from here?
A. I have no idea.
Q. When did you leave Fort Scott?
A. It was along somewhere near '70—seventy something; it was about grasshopper times.
Q. When they came, your father went to the west?
A. We came north, on the Soloman river.
Q. What year did you go there in?
A. About '78, I think; I can't recollect all the dates.
Q. What place did you go to there?
A. There was no place there then.
Q. Did your father take a homestead?
A. Yes, sir.
Q. What did you do?
A. I herded cattle.
Q. How many did you herd?
A. I herded some of the neighbors' cattle.
Q. How long did you herd cattle there?
A. Until August, I think; then my father sent me to Mexico for my health.

Q. Who with?
A. My brother.
Q. Where is your brother.

Defense object as improper cross-examination. Sustained. State excepts.

Q. How far did you live from Arapahoe?
A. 95 miles, I suppose.
Q. South?
A. Yes, sir; I think so.
Q. When was it you left your father and went to Mexico?
A. August, 1879.
Q. You went with your brother to Mexico?
A. Yes, sir.
Q. Where is he now?
A. Out here in Wyoming.
Q. Whom did you work for in Mexico?
A. For two or three big firms; for the Prairie Cattle Company; 4 or 5 Englishmen owned that ranch.
Q. You never saw the names of the members of the firms?
A. No, sir.
Q. What other firm did you work for?
A. The Pilo Blanca Cattle Company.
Q. Who owned that?
A. Woolworth; I think he owned it all.
Q. When did you work for that firm?
A. I commenced in August, 1881.
Q. How long?
A. I worked until August, 1882.
Q. He lives in Omaha?
A. Yes, sir.
Q. You have not taken his deposition, have you?

Defense object as incompetent, irrelevant, and improper. Sustained. State excepts.

Q. You were in Mexico in May and June, 1882?
A. Yes, sir.
Q. Started from there when?
A. Fourth day of August, 1882.
Q. And then met Belmont?
A. Yes, sir; I had been at home about three weeks.
Q. What other fellow did you meet at your father's?
A. Jim Burbel.
Q. You, Belmont, and Jim Burbel went away together?
A. Yes, sir.
Q. What was Burbel to do?
A. I don't know.
Q. You went how far before you found the other man?
A. To a little town, Lenora; they used to call it Spring City.
Q. There you found Bert Perryman; then you all started out until you found horses to break?

A. Yes, sir.
Q. How much was he to pay you?
A. $40 per month.
Q. He to board you too?
A. Yes, sir.
Q. Know what he paid the other fellows?
A. No, sir.
Q. You saw Nelson that testified here—that said you put horses in his corral?

Defense object as improper cross-examination. Overruled. Defense except.

A. I guess so; I heard all of them.
70 He said you was there at his place, and put horses in his corral, west of Culbertson?

Defense object as imcompetent and improper cross-examination. Overruled. Defense except.

A. We put horses along everywhere in corrals.
Q. You remember that witness?
A. Yes, sir.
Q. Did you corral the horses on Republican river, west of Culbertson?
A. Yes, sir.
Q. Where was the last place west of Culbertson that you corralled the horses?
A. I can't tell you that.
Q. Did you drive your horses through Culbertson?
A. I don't think we did.
Q. What direction from Culbertson did you pass?
A. I don't know the names of the towns.
Q. Do you know where the forks of the Republican are?
A. No, sir.
Q. Remember crossing the Republican?
A. Yes, sir.
Q. Remember of crossing the Frenchman?
A. Yes, sir.
Q. Where?
A. I have no idea; we were going north.
Q. How long did you keep north?
A. I could not say.
Q. You crossed the Republican, and came down a piece?
A. Yes, sir.
Q. Then went north and crossed the Frenchman?
A. Yes, sir.
Q. Did you corral on the Frenchman at all?
A. No, sir.
Q. Did you strike any town from the time you crossed the Republican to the Frenchman?
A. No, sir.
Q. Then what direction did you take after you crossed?

A. I think we went down aways, and back down onto the Republican, or some big river.

Q. You did not follow the Frenchman right down?

A. No, sir; we went up across on the north side, and then went — another big creek or river.

Q. Remember Indianola?

A. No, sir.

Q. Or McCook?

A. I only remember the name of Arapahoe; that is all I remember, because it is an Indian name.

Q. Go through Arapahoe?

A. Yes, sir; right through the town.

Q. Did you corral there?

A. No, sir; I think not.

Q. You know something about camp life, being in Mexico?

A. I have handled considerable many cattle and horses.

Q. From the time you went from the Republican to the Frenchman, were those other two men with you?

A. Yes, sir; all the way to this place.

Q. They did what?

A. They rode along and helped drive.

Q. Were they paid by Belmont?

A. I don't know; Belmont was a man that did not talk; sometimes he would not speak three words during the day.

A. Did you have any horses?

A. Yes, sir; I brought four home with me, when I got home from Mexico; I had one I rode and one in that heard.

Q. Where did you go from Arapahoe?

A. Went up on the divide; then struck east—seemed to me so.

Q. Your business was breaking horses?

A. Yes, sir.

Q. How many head did you break?

A. About twenty head.

Q. Remember Phelps Center?

A. Yes, sir.

Q. You spoke of Belmont being good with a revolver?

A. Yes, sir.

Q. Do you remember in this place a feller they call Kit Carson?

Defense object as improper cross-examination. Overruled. Defense except.

A. I Believe not.

Q. He was down here at the livery-stable; they call him Kit Carson.

A. I might have seen him, but I don't remember.

71 Were you there at the livery stable on the 15th of October, 1882; did you not give an exhibition of your skill with the revolver?

Defense object as immaterial and improper cross-examination. Sustained. State excepts.

Q. These two fellows you speak of that travelled with you, did you talk with them any?

A. Yes, sir.

Q. They are liberated now; they had a trial and were liberated, you said?

Defense object as immaterial, irrelevant, and incompetent. Sustained. State excepts.

Q. This Collins that was shot here, you say he was to take your place?

A. I did not know him; there was a young man here that Dick pointed out to me that was to take my place to help drive down to Hastings.

Q. Who was with you then?

A. Not anybody.

Q. You have not the depositions of the two fellows that were along with you that were liberated down in Kansas?

Defense object as immaterial, irrelevant, and incompetent. Sustained. State excepts.

Q. Anybody by when he said that?

A. No, sir.

Q. What reason was there for him to take your place?

A. I told my father I would be back in two weeks.

Q. It was at your request to leave?

A. Yes, sir.

Q. You saw Belmont shoot a rabbit 75 yards away, running?

A. Yes, sir.

Q. Those were average shots with him?

A. Those were the only shots I ever saw him shoot until he came here; those were the only three shots I ever saw him shoot at any living thing until we came here.

Q. You carried a 38 and 34, heavy barrelled?

A. Yes, sir.

Q. Did you have any other arms?

A. I had a knife.

Q. What kind?

A. A common butcher knife.

Q. When you went into the table you did not notice anybody in particular?

A. No, sir.

Q. Did you see Jack Woods when he came in?

A. No, sir.

Q. You did not intend to shoot at anybody at all that was there?

A. It was through excitement; I did not know what I was doing.

Q. Did you state in this town on the evening of the 15th of October, 1882, at the livery barn across here on the corner, to a man called Kit Carson, these words: "Any damned son of a bitch that tries to arrest me I will shoot him?"

Defense object as incompetent, irrelevant, and puts it as a general

statement against everybody, and not against the deceased in this case. Overruled. Defense except.

A. I never made any such threats.

Q. Did you state to him at the same time and place the following: "If any man attempts to arrest me for horse stealing I will shoot him;" or words to that effect?

Defense object as immaterial, irrelevant, and incompetent, not calling for for declarations made to any person at any time or place. Overruled. Defense except.

A. No, sir.

Q. You sat on the right-hand side of Belmont?

A. Yes, sir.

Q. What did Woods say?

A. It was a quarter of a minute before he spoke; then he said: "Well, boys, consider yourselves under arrest." I threw up my hands and Woods threw a six shooter in my face.

Q. What did Belmont do?

A. Pulled two six shooters and went to shooting; I saw him fire three shots; one at me and one at a stranger.

Q. And the other at whom?

A. I don't know; he was a stranger to me.

72 You could swear to what the people told about a sheriff down in Kansas setting those men free?

Defense object as incompetent, irrelevant, and improper. Sustained. State excepts.

Q. You got shot through the pocketbook?

A. Yes, sir.

Q. Where did the ball stop?

A. It went through all the shirts; I had it in my vest pocket a good while, and gave it to the sheriff here?

Q. What did you do outside?

A. I tried to catch my horse.

Q. Did you fire any shots outside.

A. Not until I got onto my horse.

Q. You did not run around the building and fire at Sheriff Ericson?

A. No, sir.

Q. Where did you go after getting on your horse?

A. South.

Q. Where did you stop the first night?

A. 15 or 20 miles southwest.

Q. Camp right down on the prairie?

A. Yes, sir.

Q. What time did you stop?

A. I can't tell; it was in the night.

Q. stay there all day?

A. No, sir.

Q. Travel in the day time?

A. Yes, sir.

Q. Where did you next stop?
A. We rode 15 or 20 miles that day.
Q. Did you sleep the first night?
A. Yes, sir.
Q. You and Dick too?
A. Yes, sir.
Q. What made you run from the town here, if you did not shoot?
A. It was through excitement.
Q. Your horse stopped and balked; you could then cool off?
A. Yes, sir.
Q. You had some trouble catching your horse?
A. Yes, sir.
Q. Some — threw you down as you came out?
A. Yes, sir.
Q. On top of you?
A. No, sir; side by side, and I heard Dick say "get off," and the man got away.
Q. Why did you not stay there if you had not shot anybody?
A. I did not know there was anybody to give myself up to.
Q. Where did you find out first that Belmont had shot somebody?
A. Down in Kansas somewhere.
Q. You were running because you thought Belmont had shot somebody?
A. Yes, sir.
Q. You did not catch hold of Jack Woods' hand at all?
A. No, sir; he was not held at all.
Q. He got two shots in the back?
A. Yes, sir.
Q. Belmont fired them?
A. Yes, sir; I saw him fire two shots towards the door; I was standing against the table.
Q. You don't know whether you revolver went off or not?
A. I could not swear whether it did or did not.
Q. Did you count the charges in your revolver afterwards?
A. No, sir.
Q. When did you first take your hands down after you put them up?
A. Right after Dick shot me.
Q. Those horses you were breaking had no brands on them except Texas brands?
A. No, sir.
Q. They had no lazy Z (L) on them?
A. No, sir.
Q. In that Western country the horses run right out wild?
A. Yes sir.
Q. And when a man wants them he goes and rounds them up?
A. Yes, sir.
Q. You were hired by him at $40 per month?
A. Yes, sir.
Q. You never asked any questions?
A. No, sir.

Q. Did you ever see anything in his conduct that was suspicious?
A. Yes, sir; he seemed to be watching.
Q. You were with Belmont when he was killed?
A. Yes, sir.
Q. They got you first?
A. Yes, sir; there were four men in the ranch with me.
73 Q. On your ride down to Texas, you stopped 15 or 20 miles out of here?
A. Yes, sir.
Q. Then you got up and went along?
A. Yes, sir.
Q. Did Belmont threaten to shoot you on the road?
A. No, sir, but watched me.
Q. Did he tie you?
A. No, sir.
Q. You staid with him until he was killed?
A. Yes, sir.
Q. And you thought he had killed some men?
A. Yes, sir.
Q. Did you try to leave him?
A. I knew it was no use.
Q. Never tried to get away when he was asleep?
A. You could not tell when he was asleep.
Q. You felt pretty friendly to him after he had shot at you?
A. We did not say much.
Q. This transaction with Belmont is the first time you ever was arrested?
A. Yes, sir.
Q. Your folks live only 95 miles south of Arapahoe?
A. Yes, sir.
Q. These young men that came with you live there somewhere?
A. Yes, sir.
Q. What was Belmont doing when you first came out of the room?
A. I hardly know.
Q. From the time that first shot was fired, commence and tell minutely what you saw Belmont do.
A. The first shot was fired at a stranger
Q. The man that was trying to arrest you?
A. Yes, sir.
Q. The next shot was fired at whom?
A. At me.
Q. The next one?
A. At the west door.
Q. Then what did you see Belmont do?
A. I started for the door and some one threw me down; I was sort of blinded; I could not see anything; then I heard Dick say "Get off from there," and the man let go of me; then I heard a shot, and I got up and went out for my horse.
Q. When did he pull his two revolvers?
A. He pulled one right after the other; he pulled one with his

right hand, and shot at Jack Woods, and with his left hand shot at me.

Q. He was clearing the room that way?

A. The room was already cleared; they all had gone—that is, all had gone from that part of the room—that is, the west part, in front of me.

Q. Where did you meet the man you say you met?

A. A foot and a half to two feet from the door.

Q. Where was Belmont as this fellow turned you looose?

A. He stood right there.

Q. Remember of his going round the south side of the house?

A. No, sir.

Q. He did not follow any man around the house?

A. No, sir.

Q. Remember of his riding up and down the street and telling them to get in the house?

A No, sir; I don't remember.

Q. Your horse balked?

A. Yes, sir.

Q. Quick as you could get on your horse, you and he rode off together.

A. Yes, sir.

Q. How many revolvers did Belmont have;

A. Four revolvers; two in his coat pocket, and this one here inside of his breeches, and the other in a scabbard.

By Mr. BURR:

Q. Was the knife you had in a scabbard?

A. Yes, sir.

Q. Is it not customary for all men on the frontier to carry a knife and revolver?

A. Yes, sir.

Q. The ball that struck you, and went through your shirt, was in your vest pocket?

74 A. It was in it when I gave it to Knobes, and he gave it to Sheriff Ericson.

Q. Was the blood that came from the wound on the shirts when you turned them over?

A. They had not been washed by me.

C. A. ERICSON called.

By Mr. BURR:

Q. When you received Simmerman from Nobes at Lincoln, did you receive any of his wearing apparel?

A. I had a small bag full of clothes; there was a vest and two shirts.

Q. Where are those two shirts?

A. Down at my place, 9 miles from here; I don't think the vest is there; I think it was lost at Kearney; there were two holes in the vest and one in the red shirt.

Q. Where did the holes go through the vest?
A. In the left side.
Q. And the same holes correspond with the one in the red shirt?
A. Yes, sir; that was next to the body.
Q. Was it bloody?
A. It was kind of stiff around the hole; I presume it was bloody.
Q. Did you examine the vest pockets?
A. No, sir.
Q. Can you state whether there was a bullet in the vest pocket or not?
A. No, sir.
Q. Explain to the jury why you did not bring those clothes down here.
A. I was not subpœnaed to bring them; you spoke to me sometime ago and I forgot it.

Cross-examination by Mr. MORLAN:

Q. You are sheriff, and had something to do with that shooting that evening?
A. Yes, sir.
Q. State what you know about Simmerman getting a wound that evening.
A. Well, after I got out I fired a shot at him; I missed him the first time; then he turned round and I shot him, and I think I hit him in the side; he doubled up to the left as though it hit him.
Q. Ever talk with him about it since?
A. Yes, sir; I told him Belmont never shot him; that I did; he said Belmont shot him.
Q. This shot he got in the side, you think you gave it to him?
A. Yes, sir.

By Mr. BURR:

Q. Do you know whether you hit him or not?
A. As soon as I fired he doubled up.
Q. What was the size of your revolver?
A. 45.
Q. Won't you see to it that those clothes are here for the jury in the morning?
A. The vest is not there; it was left in Kearney.
Q. Has there not been a subpœna served on you, with that in—for you to bring those clothes?
A. No, sir.

Defense here offer in evidence a certified copy of the opinion of the supreme court in a former trial of this cause, marked Ex. A and hereto attached. State objects as immaterial, irrelevant, and incompetent. Sustained. Defense except.

T. J. COURTNEY recalled.

By Mr. BURR:

Q. Did you know Collins?

A. Yes, sir.
Q. Do you know what his occupation was the 16th of October last?
A. He commenced carrying the mail on that day.
Q. You testified that you signed some affidavit?

State objects as immaterial and gone over already. Overruled. State excepts.

Q. At whose request did you make that affidavit?
A. Stewart's.
75 Q. The assistant prosecutor in this case?
A. Yes, sir.
Q. Did Ericson request you to sign that affidavit?
A. No, sir.

Cross-examination by Mr. STEWART:

Q. Did you ever have any conversation with Ericson in regard to making that affidavit?
A. He never requested me to make it.
Q. Did you ever talk with him about making it?

Defense object as improper. Sustained. State excepts.

Q. You say I requested you to make it?
A. Yes, sir.
Q. Did I state what I wanted it for?

Defense object as improper. Sustained. State excepts.

Q. Did anybody tell you to come round to my office and sign an affidavit?

Defense object as before. Sustained. State excepts.

Q. Did you sign an affidavit for publication?

Defense object as before. Sustained. State excepts.

MATHIAS SIMMERMAN, recalled for further cross-examination.

By Mr. MORLAN:

Q. What is the difference between a half-box brand and a lazy L?
A. Well, a good deal of difference.
Q. Well, make one of each kind. (Witness does so on paper.)

JAMES T. WRAY recalled.

By Mr. MORLAN:

Q. What is the difference between a "Lazy L" brand, and a half-box brand?
A. No difference—I call them the same; the brand is perfectly square, and as it is turned it will be a "Lazy L;" or upright, it would be a regular L, and when turned down we call it a "Lazy L" brand; it is a half box in any position.

The jurors here ask the witness for illustrations on paper and witness makes them with pencil.

By Mr. BURR:

Q. That L you have, one part is twice as long as the other side?
A. Yes, sir; that is the way it is made.

KIT CARSON called and sworn:

By Mr. MORLAN:

Q. Ever met this defendant, Mathias Simmerman, before?
A. Yes, sir.
Q. Have any conversation with him on the evening of October 15, 1882, at a livery stable in this town?
A. Yes, sir.
Q. State what it was.

Defense object as incompetent, immaterial, and irrelevant. Sustained. State excepts.

Q. Did he state to you, at a livery barn in the town of Minden here on the 15th of October, 1882, that he would shoot anybody that attempted to arrest him for horse stealing?

Defense object because not asked as to threat or declaration made as to the deceased; as irrelevant, incompetent, and no foundation laid. Overruled. Defense except.

A. Yes, sir.

Defense move to strike out the answer of the witness as immaterial, irrelevant, and incompetent. Overruled. Defense except.

Cross-examination by Mr. BURR:

Q. Where did you meet this man on that day?
A. At the livery stable and at the hotel; I had the conversation with him at the livery stable.
Q. How did it arise—the conversation?
A. It commenced here by seeing a light in the court-house.
Q. What did he say?
A. He wanted to know who was under arrest for stealing horses; I said Hare was; he said the first damned son a of bitch that
76 tried to arrest him for horse stealing he would kill him or he would him.

Defense move to strike out the evidence of the witness on the ground of being irrelevant, immaterial, and incompetent. Overruled. Defense except.

By a JUROR:

[Q.] Was there any examination made as to the size of the balls in those bodies?

(No response.)

Again by JUROR:

[Q.] I would like to know whether they were 38 or 45?

(No response.)

The court here again admonishes the jury, under the statute, before separating, and adjourns until to-morrow morning at half past eight o'clock.

Jury retire to deliberate upon their verdict at 5 o'clock p. m. Wednesday, October, 24th, 1883.

I hereby certify that the foregoing is a true and correct transcript, of the oral evidence given on the trial of the above-entitled cause.

F. M. HALLOWELL, *Reporter.*

The persons called and examined on their *voir dire* as to their competency to sit as jurors in the above-entitled cause were called in the following order. I do not give full examination as no exception was made by either party to any one excused for cause, or to those remaining on the panel, or any one of them.—Reporter.

1. William Blaney, sworn to answer questions, passed for cause.
3. Oliver Sutton, excused for cause.
4. E. W. Fosbery, " "
5. George Gillette, " "
6. Charles Glenn, " "
7. Irvin Hawes, " "
8. Wm. Thompson, " "
9. Wm. P. Convers, " "
10. W. B. Miller, " "
11. James Bartlett, " "

Regular panel here exhausted, and deputy sheriff calls to fill the panel.

12. J. A. Layman, excused for cause.
13. A. J. Wharton, " "
14. Simen Parber, " "
15. L. D. Roles, " "
16. Nels Hanson, " "
17. August Victor, passed for cause.
18. C. Linehart, excused for cause.
19. M. Lanning, " "
20. Wm. A. Shultz, passed for cause.
21. Patrick Hines, passed for cause.
22. John Meyers, excused for cause.
23. Fred Guese, " "
24. Lawrence Corell, " "
25. —— Corey, " "
26. G. C. Thompson, passed for cause.
27. —— Stigson, excused "
28. Charles Siles, passed "
29. Samuel Dickman, excused "
30. John B. Petersen, passed for cause.
31. Charles De La Barre, " "
32. S. M. Nelson, " "
33. Richard McGuire, excused "
34. Thomas McGuire, excused for cause.

77 35. S. C. Boone, excused for cause.
36. I. L. Bent, " "
37. R. G. Patterson, " "
38. Chas. H. Prindle, passed "
39. George T. Smith, " "
40. Peter Pearson, excused for cause.
41. D. C. Robbins, passed "
42. E. C. Swanson, " "

Defense here challenge August Victor as their first peremptory challenge.

43. George Mellinger, passed for cause.

Defense here challenge John B. Peterson as their second peremptory chal.

44. M. M. Barney, passed for cause.

Defense here chal. Patrick Hines as their third peremptory chal.

45. Milton Winslow, excused for cause.
46. Eli Erickson, " "
47. Nathan Nelson, " "
48. H. G. Cook, " "
49. Eli Ritchil, " "
50. John P. Johnson, " "
51. John Swanson, " "
52. J. H. Plank, " "
53. Ben Nelson, passed "

State here waives their first peremptory challenge.

Defense here chal. Ben Nelson, as their 4th peremptory chal.

54. S. C. Boostrom, excused for cause.
55. B. F. Sheppard, " "
56. Charles Carlson, " "
57. Alex. Maxell, passed "

Defense here chal. M. M. Barney as their 5th peremptory chal.

59. T. B. Swanson, excused for cause.
60. J. F. Bloodgood, passed "

State here waives its second peremptory challenge.

Defense here challenge J. F. Bloodgood as their 7th peremptory chal.

61. L. Warman, excused for cause.
62. L. Rodstein, " "
63. M. W. Cozier, passed "

Defense here challenge Wm. H. Shultz as their 8th peremptory chal.

64. Fred Lange, excused for cause.
65. John Swart, " "
66. Frank Sutton, " "
67. —— Townsend, " "

68. W. C. Merryman, excused for cause.
69. —— Watson, " "
70. Joseph Slack, " "
71. John L. Johnson, " "
72. Henry Salskeeper, " "
73. Wm. McCartney, " "
74. John Drone, " "
75. A. C. Woodard, passed "

Defense here waives their ninth peremptory chal., and State waives its third peremptory. Jury here sworn at six o'clock p. m., Oct. 22nd, 1883, as follows:

1. Charles De la Barre.
78 2. William Blaney.
3. E. C. Swanson.
4. Charles Siles.
5. S. M. Nelson.
6. Charles H. Prindle.
7. George T. Smith.
8. D. C. Robbins.
9. George Mellinger.
10. A. B. Starkey.
11. M. W. Crozier.
12. A. C. Woodard.

And afterwards, on the 22d day of October, 1883, the defendant filed an affidavit, in words and figures following, to wit:

Affidavit of A. F. Parsons.

In the District Court held in and for Kearney County.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

Albert F. Parsons, being first duly sworn, upon his oath deposes and says: That he is more than twenty-one years of age, and is a citizen of Lancaster county, Nebraska; that he has held conversation with a number of the citizens of Kearney county, and that the universally-expressed opinion of said citizens was that in the event of the jury trying said Simmerman bringing a verdict of anything less than murder in the first degree that the said prisoner, Simmerman, would never be allowed to leave Minden alive, but would certainly be hung by the citizens of said Kearney county; this affiant further says that the citizens he talked with were from different parts of said Kearney county, as many as six different men being from the county, while a greater number were from Minden, and that said conversation with said citizens of Kearney county occurred on or about September 25th, 1883, while this affiant was in said county for the purpose of obtaining affidavits of citizens of said county to the effect that said Simmerman could not have a

fair and impartial trial in said county, on account of the bias and prejudice of the citizens thereof.

That in company with one of the editors of a paper in Minden (Mr. Hardman, as this affiant remembers the name) this affiant visited a farm about two miles northeast of Minden, where a number of farmers were engaged in threshing, and this affiant asked the opinion of each and every one of them, and they all agreed and stated that if Simmerman were not convicted and sentenced to be hung the people would hang him anyway, and that he could never leave Minden alive. Affiant says that on his arrival in Minden he was shown by a citizen of Minden the scaffold upon which they proposed to hang Simmerman if they ever got him there again, as said citizen expressed it, the said Simmerman being then in the penitentiary in Lincoln. Affiant says that said editor, a citizen of said county and of Minden, expressed the same opinion as the farmers above alluded to, and further stated that he believed it to be the sentiments of the citizens of said county generally that Simmerman would be hung, even though the jury should acquit him.

A. F. PARSONS.

Subscribed in my presence and sworn to before me, this 18th day of October, A. D. 1883.

[SEAL.] F. C. HARRISON, *Notary Public.*

79 And afterwards, on the same day, October 22nd, 1883, an affidavit of Albert F. Parsons was filed by the defendant in the office of the clerk of the district court, in words and figures following, to wit:

Affidavit of Albert F. Parsons.

In the District Court in Kearney County, Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

THE STATE OF NEBRASKA, } *ss:*
Kearney County, }

Albert F. Parsons, being first duly sworn, upon his oath deposes and says: That he is more than twenty-one years of age, a resident of Lancaster county, Nebraska; that on or about the 25th day of September, 1883, affiant was in Minden, Kearney county, Nebraska, and while in conversation with M. R. Hardman, one of the editors of the "Reporter," a paper published and of general circulation in said county, said Hardman told this affiant that, at the trial of Mathias Simmerman, at Minden, said county and State, on or about the twelfth day of December, 1882, he saw in the court-room where said trial was being held a rope brought into said court-room, and kept there during the whole trial of said cause for the openly-avowed purpose of hanging said Simmerman by a mob if the jury should fail to convict the said Simmerman of murder in the first degree, and the said Hardman then and there told this affiant that he still believed the general sentiment of the people of said Kearney

county to be that if he, Simmerman, should be tried again and not convicted the people would hang him.

Said Hardman was with me when several citizens of said county refused to make affidavits to statements made by them, similar to those above mentioned, in regard to the sentiments of the citizens of said county of Kearney regarding the Simmerman case, for the reason that they did not want to be considered as doing anything to assist said Simmerman while the sentiment was so strong against him in the county. Said Hardman told this affiant he would not want to make affidavit to his opinion on the said subject of the sentiment in said county as to the Simmerman case, for the same reason as that given by the other citizens above mentioned.

A. F. PARSONS.

Subscribed in my presence and sworn to before me, this 22nd day of October, 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

And afterwards, on the same day, to wit, October 22, 1883, the defendant filed an affidavit of L. C. Burr in the office of clerk of the district court, in words and figures following, to wit:

Affidavit of L. C. Burr.

In the District Court of Kearney County, Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

STATE OF NEBRASKA, } *ss:*
Kearney County. }

L. C. Burr, being first duly sworn, on his oath says: He is attorney in this case for said defendant. The affiant is a resident of Lancaster county, Nebraska, but has been for the last six months well acquainted with the general public sentiment and feeling towards the defendant in this case in the said county of Kearney.

Affiant further says that said defendant cannot have a fair and impartial trial in the county of Kearney, on account of the prejudice and bias of the citizens of said county of Kearney against said defendant.

Affiant further says that said alleged shooting of Jack Woods has caused public discussion in the newspapers of the State of Nebraska, and is a matter of public notoriety; that on account of the
80 prejudice and bias of the citizens of the said county of Kearney towards the defendant he cannot have a fair and impartial trial in said county.

Affiant says that next following is a portion of the original papers cut out of the Daily State Journal, a newspaper of wide and general circulation in the county of Kearney and State of Nebraska, and published at Lincoln, Nebraska, and was dated and issued on the 7th day of October, 1883. Also next following is a portion of the Daily State Democrat, a newspaper published at Lincoln, Nebraska, and of wide and general circulation in Kearney county and the

State of Nebraska, and *to* which said paper was dated October seventeenth, 1883, to wit:

Printing Cut Out of Newspaper.

Journal, Oct. 17, 1883.

Matt Simmerman.—Sheriff Ericson brings him as far as the city, but concludes he is not entitled to him.

Sheriff Ericson, of Kearney county, came down to-day to take two prisonere who had been granted new trials from the penitentiary back to Kearney county. One of these was Francis Hair, who was sent up for ten years for horse stealing. He was granted a new trial by the supreme court, and was taken back to Minden yesterday by the officers. The other was one to which a good deal of interest attaches, both on account of the nature of the crime with which he is charged, and the efforts which have been made to secure him a new trial and give him what is to [be] believed he did not have before—an impartial and careful hearing. There are few readers of the Journal who do not know who Simmerman is. He is the man who was with Dick Belmont or Coleman when Sheriff Jack Woods and another man were killed by him at Minden. He was sentenced to be hung, but has been granted a new trial.

Sheriff Ericson brought Simmerman as far as town, along with the other prisoner Hare. He was not fully satisfied, however, that the proceedings by which he was taking Simmerman away were entirely regular, and not wishing to take him where he would be subjected to the danger of lynching, perhaps without being satisfied that he was acting in strict accordance with the law in every particular, he concluded to leave him.

We understand that Governor Dawes was consulted, and that it was partly on his advice that the sheriff concluded to leave the prisoner until he could get more explicit directions from the authorities. There is no excuse for the exercise of lynch law in this case. There is no question, however, in the mind of any one who knows the temper of the friends of the murdered man that it would be unsafe for Simmerman to be taken to Minden without a guard strong enough to overawe mob violence, and the tenor of the intelligence which came from there yesterday, when Simmerman was expected, bears out this view. Any action which Governor Dawes may take to protect the prisoner from being subjected to even the possibility of being lynched will meet with the heartiest approval of the law-abiding citizens of Nebraska.

Democrat, Oct. 17, '83. Simmerman not taken back.

As is already known, Matt Simmerman, charged with the shooting of Sheriff Jack Woods at Minden, over a year ago, and since then tried and sentenced to be hung, has been granted a new trial by the State supreme court. Sheriff Ericson, of Kearney county, came down yesterday to take Simmerman back and place him in jail in Minden. The sheriff went out to the prison, got his man,

and came back to the city with him. He had some doubts
81 as to whether he was entitled to his prisoner, and also feared that Simmerman might be lynched when they returned. The sheriff consulted Governor Dawes, and it was decided to leave the prisoner until more explicit direction could be obtained from the proper authorities. It is said that there is a strong feeling at Minden against Simmerman, and that the sheriff's fears that the prisoner would be lynched are well grounded.

Francis Hare, of Kearny county, who had been sentenced to ten years in the penitentiary for horse stealing, was granted a new trial and was taken back.

Affiant further say that he has talked with the livery stable keepers, the hotel men, and residents of Kearney county, and all that affiant has met and asked their opinion of the feeling and sentiments of the citizens of Kearney County in regard to Matt Simmerman. Each and all of them told affiant that it would be unsafe to bring the body of said defendant into Kearney county, for the reason that the feeling was so strong against said defendant that if chance could be had by the said citizens they would surely hang him by mob violence.

Affiant says he has talked with at least ten of the citizens of said county, all of whom did object and still objects and refuse to sign an affidavit on behalf of said prisoner, although requested by affiant so to do.

Affiant says he has read certain of the newspapers published at Omaha, Hastings, Lincoln, Minden, and other prominent newspapers, all published and of general and wide circulation in said State, containing articles and comments on the conduct of defendant at Minden, Nebraska, as alleged in the indictment, and each and all of said publications did and do show a feeling of prejudice and bias against the defendant, and hereto and immediately following is a portion cut out of the Kearney County Gazette, a newspaper published at Minden, Kearney county, Nebraska, of date the fifth day of September, 1883.

Affiant further says that on the 19th day of October, 1883, he had a conversation with George M. Watkins and another gentleman, the name of whom affiant has forgotten, proprietors of the said Kearney County Gazette; that affiant asked of them, and each of them, what the feeling and sentiment of the citizens of said county was towards said Simmerman, and they both told affiant that it was simply an insane attempt to bring said Simmerman to said Kearny county for trial (said Simmerman now being at Lincoln, Nebraska, in the penitentiary). Affiant asked then what they meant, and told them that the good citizens of Kearney county would not allow any harm to come to Simmerman, when one of said editors (whose name affiant cannot remember) said that he was so certain that the feeling against Simmerman was so strong that he had already, and at that time had, written an article for publication in said newspaper, part or all of them being — and hanging of Simmerman, which each of said editors declared to affiant would certainly take place on the night of October twentieth, 1883 (to-morrow night).

Affiant further says that several citizens of this (Kearney) county

have told affiant that if Simmerman had a trial [and] was found not guilty, that then the citizens of said county would hang said Simmerman, and affiant is positive and certain that there is now danger of the unlawful hanging of said Simmerman, and that he cannot have a fair and impartial trial in said county.

Affiant further says he has just returned from the office of said Kearney County Gazette, and found the name of said person to be Howard. Affiant requested of each of said editors that they sign an affidavit of the facts herein stated, and each of them refused so to do, and positively decline to sign an affidavit for said defendant,

and the following is a portion of said Kearney County Ga-
82 zette, of date September 5, 1883, viz:

After reading the decision of the supreme court setting aside the action of the Kearney county district court in the Matt Simmerman case, a Western sheriff writes to the Lincoln Journal to know "if the supreme court expects an officer to walk up to a desperado, who is known to be on the shoot, and then and there as aforesaid inform the desperado that he, the officer, is a truly and properly qualified sheriff, a minion of the law, duly made and provided, and, if at this stage in the proceedings, the desperado as aforesaid acquires the drop on the sheriff and bores a hole through him with a bullet, what is to be done about it? We think the best way to settle the matter is to shoot the desperado, and while the coroner is 'sitting on the dead body' let the sheriff read the warrant, but be very careful to not whisper it to the supreme court, for they might want to put in a 'stay of execution,' eh?"

And affiant further says that the following is a portion of said Kearney County Gazette, cut out of the issue of publication of date Saturday morning, October 20th, 1883, to wit:

The Zimmerman case.

The district court convened in this city last Thursday. Interest in the cases of Zimmerman and Hare drew a large attendance. The disappointment was general when it was announced that the Governor had refused to allow Zimmerman to be removed from the penitentiary, assigning as cause for such action that he believed Zimmerman would be lynched if removed to this county. It may not be unseeming to state right here that Governor Dawes is taking a course that will in nowise prove best for his pet criminal. He has done more by this last step to arouse a spirit of mob law than he imagines. The people of Kearney county are capable of administering the laws, and are law-abiding to a high degree, a fact evidenced by the fair and impartial hearing according to the blood-thirsty murderer throughout his former trial. Zimmerman belongs to this county sheriff, and this attempt of the Governor to detain the prisoner will not have a tendency to excite sentimentalism in behalf of the inhuman monster.

The Omaha Herald and Lincoln Journal are laboring assiduously in behalf of Zimmerman, daily giving space to pleas for clemency, reciting the many good qualities of the young and "innocent" murderer. Zimmerman's "innocence" has been established by the ver-

dict of twelve good men, and it will take a better argument than has yet been advanced to convince the people in this vicinity that that verdict is not just.

At this writing, Friday evening, Zimmerman has not arrived, but it is asserted by those in position to speak advisedly that he will certainly be here to-morrow.

The prevailing opinion is that Zimmerman will receive a warm "reception."

Affiant says he talked with the said editor of said paper last named, and pointed out to him that [the] name of Simmerman in said article was spelled with a "Z," and said editor told affiant that the same was simply an error, and that the "Z" should and ought to have been an "S."

Affiant further says he hereto attached immediately following a portion and part of Minden Weekly Reporter, a newspaper published at Minden, Kearney county, Nebraska, of date (first) September, September 6th, 1883, each of said pieces being cut out of papers at that date, to wit:

83 Mat Simmerman has been granted a new trial by the supreme court, to be tried of the fall term of our court. This was done on mere technicalities, and we see by the papers one was that the witness who swore he saw him shoot Jack Woods did not identify the place where the deceased lay after being killed, and, second, that there was no testimony that said deceased was sheriff of Hitchcock county, Nebraska. These quibbles, it seems to us, are mere notes, and if they are points necessary to prove to make a case of murder it is indeed hard to get justice at the hands of the law. No, there are scores of men and women here that know by personal knowledge that that same Matt Simmerman was one of the two that did the shooting that caused the death of Woods, Kelly, and Collins, and wounded Larson in the hand. This county has been strictly law-abiding in the case, but the courts and the law has deferred justice and heaped upon the taxpayers of the county hundreds of dollars, and now we are to duplicate these expenses and allow such monsters to live when justice in fact demands the death penalty summarily. The patience of the people is about exhausted, and time must prove them still as law-abiding as they have been in the past.

The supreme court is saving this State much expense by the way it does business. It saves the buying of rope. It saves the building of scaffold. It is turning the State into a free country, regardless of law. Glory on these judges! Their supreme decisions should be appreciated by murderers and horse thieves and other righteous donkeys.

They should be re-elected, because they have done more to suppress crime than any other set of men who ever held positions in the supreme court. The Governor should have a medal with the phiz of a donkey cast thereon and presented to these honorable gentlemen. Great men should always be looked up to. Common mortals get down on your knees and pray. If you have a bad case of

mother-in-law kill her, and have our case carried to the supreme court. This is a free country, thank the Lord.

And affiant further says that while in the office of the said Minden Weekly Reporter he had a talk with an aged gray-whiskered man, who was folding papers and mailing them, and said gentleman said he had lived in Kearney county for the past number of years; that he was present at the last trial of said defendant; that during said trial he saw a rope in the court-room which certain of the citizens of said county had to hang said Simmerman in case the jury failed to convict said Simmerman of murder in the first degree. Affiant asked said gentleman if he meant that the said citizens intended to mob or lynch said Simmerman and hang him with said rope, and he answered: "Yes; they did, and would have done so had not the jury convicted said Simmerman." Affiant then told said gentleman that he would like to have him sign an affidavit stating said facts, but he refused so to do. This person is the person of whom affiant bought the "Minden Weekly Reporter," a portion of which is hereinbefore attached to this affidavit.

L. C. BURR.

Subscribed in my presence and sworn to before me, this 22nd day of October, 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

And afterwards, on the same day, to wit, on the 22nd of October, 1883, the defendant filed in the office of the clerk of the district court an affidavit, in words and figures following, to wit:

Affidavit of Mathias Simmerman.

In the District Court, Kearney County, Nebraska.

THE STATE OF NEBRASKA *v.* MATHIAS SIMMERMAN.

84 STATE OF NEBRASKA, } *ss:*
Kearney County, }

Mathias Simmerman, being first duly sworn, on his oath says: He is the defendant in this case; that he is well acquainted with the sentiments of the citizens of said county in regard to this case, and he verily believes a fair and impartial trial cannot be had of said cause in said county on account of the prejudice and bias of the citizens thereof. Affiant says he has been confined in the penitentiary at Lincoln, Nebraska, and the county jail of said county ever since he was arrested for said charge, and has only had the newspapers to inform him of the facts above stated; that affiant was not, nor never has been, a resident of said county. Affiant was present in the court-room during his last trial; that threats was then made of hanging affiant, provided affiant was not convicted by the jury of murder in the first degree; also my counsel, Mr. Hamilton, was threatened with great bodily harm, and stated and told the jury in open court that he was afraid of his life for defending Simmerman; that the sentiments and feelings were so

strong that some ten or more guards were appointed to prevent the hanging of affiant, and said guards kept one stack of guns stacked near the jury-box in the court-room and others had revolvers. Affiant says the feeling of prejudice and bias against him has not subsided, but, if anything, has increased, and that at this time most of the citizens of said county are expecting to see affiant lynched by a mob, and that the feeling against affiant is so strong that none of the citizens know of facts that would aid affiant, refuse, and will not sign affidavits, and affiant is positive that he cannot have a fair and impartial trial in said county on account of the prejudice and bias of the citizens of said county towards this affiant.

MATHIAS SIMMERMAN.

Subscribed in my presence and sworn to before me this 22nd day of October, 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

And afterwards, to wit, on the 22nd day of October, 1883, the plaintiff filed an affidavit in the office of the clerk of the district court in words and figures following, to wit:

Affidavit of Levi M. Copeland and et al.

In the District Court of the Eighth Judicial District in and for Kearney County, in the State of Nebraska.

THE STATE OF NEBRASKA *v.* MATHIAS SIMMERMAN.

Indicted for murder in the first degree.

THE STATE OF NEBRASKA, } *ss:*
Kearney County, }

Levi M. Copeland, J. W. Gorden, V. Abrahamson, J. W. Gilman, W. F. Chrisler, W. E. Van Hise, Lewis A. Kent, S. B. Robinson, John A. Vanden Bury, Thomas Bayer, Geo. Harding, Theodore Lambert, Rush H. Palmer, Nels. C. Johnson, C. J. Hulquist, E. Gilson, E. F. Newell, J. H. Plank, Soderquist, M. J. Springer, Lewis Bartow, Peter P. Swanson, W. D. Hart, H. Johnson, Joseph Pinkham, each being first duly sworn, depose and say each for himself: That I am a resident of said Kearney county, and have resided in said county for more than two years last past, and am over twenty-one years of age; that I am well acquainted throughout said county; that within the last year the construction of a railroad through said county has been commenced, and there has been a large immigration into said county within the last year, and a large portion of the inhabitants and residents of said county having the qualifications of jurors have located in said county within the last year and since the former trial of
85 this case. Affiant further says the scaffolding erected on the north side of the court-house alluded to in the affidavit of A. F. Parsons was erected for the purpose of carrying into execution the sentence of the court upon the former trial of this case, and has since been destroyed.

Affiant further says that he believes that the talk of hanging Simmerman has been more by people outside of the county and by non-residents of the county than by citizens of the county.

Affiant further says that at no time since the former trial has there been any danger of lynching the said defendant, and that he believes said defendant is as safe from mob violence and lynching in said county as any county in said judicial district.

Affiant further says that said Jack Woods, for the shooting of whom the said defendant is indicted, had, at the time of shooting, and now has, no relations in said Kearney county, and few, if any, acquaintances in said county; that the supposed fear or talk of mob violence against said defendant is wholly unfounded, and that the defendant is entirely secure from any unlawful violence in said county.

Affiant further says that he believes the defendant can have a fair and impartial trial in said county free from any bias or prejudice whatever.

Levi M. Copeland.
J. W. Gordon.
V. Abrahamson.
J. W. Gilman.
W. F. Christer.
W. E. Van Hise.
Lewis A. Kent.
S. B. Robinson.
John A. Vanden Burg.
Thomas Bayer.
George Harding.
Theodor Lambert.
Rush H. Palmer.
Nels C. Johnson.
C. J. Hulquist.
E. Gilson,
E. F. Newell.
J. H. Plank.
Soderquist.
M. J. Springer.
Lewis Barton.
Peter P. Swanson.
W. D. Hart.
H. Johnson.
Joseph Pinkham.

Subscribed in my presence and sworn to before me, this 22nd day of October, 1883.

S. C. STEWARD,
Justice of the Peace.

Fees for taking the affidavits of the above 25 persons, $6.25.

And afterwards, to wit, on the 22nd day of October, the plaintiff filed an affidavit in the office of the clerk of the district court, in words and figures following, to wit:

Affidavit of J. H. Jensen.

In the District Court of Kearney County.

STATE OF NEBRASKA *v.* MATHIAS SIMMERMAN.

J. H. Jensen, being first duly sworn, deposes and says: That he was present at the former trial of this cause; that he was at that time and still is clerk of said court; states as follows: I and another man had been using a small rope to let a weight through the chimney on the court-house, which was done for the purpose of cleaning said chimney; that I left the said rope in the court-room after

being done with it for the purpose above stated; that the said rope was left in the court-room long before the trial by me, but not with the intent of having it used to hang Mathias Simmerman or any other person or persons; that the same rope was in the court-room in the court-house of Kearney county over one month after the trial of Mathias Simmerman in December, 1882.

Affiant further says that at the opening argument of Mr. Hamilton, the attorney defending Simmerman on the former trial, he heard the said Mr. Hamilton state as follows:

Gentlemen, I am thankful to you for the kindness with which I have been treated by you. I had heard before I left my family and home in Kansas that the people of Kearney county would do
86 bodily harm to any man or attorney that made any effort to defend Simmerman, and my family to-day fear that I am in this very hour in danger; but I am thankful to you, and happy to say that the citizens of Minden have treated me far better than I had expected, and with as much kindness as any man could be treated.

Affiant further says that the statement set forth in the affidavit of Mathias Simmerman concerning the expressions of Mr. Hamilton is not true.

J. H. JENSEN.

Subscribed and sworn to before me, this 22nd of October, 1883.

WILLIAM GASLIN, JR.,
Judge 8th Judicial District, Nebraska.

Affidavit of L. C. Burr and A. F. Parsons.

In the District Court of Kearney County, Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

THE STATE OF NEBRASKA, } ss:
Kearney County, }

L. C. Burr and A. F. Parsons, being first each severally sworn, upon his oath, deposes and says: That they were attorneys for the defendant in trial of above-entitled action; that W. S. Morlan, prosecuting attorney, made use of the following language in his argument to the jury, in speaking of the defendant as a "Billy, the Kid, or Jesse James sort of a cowboy;" and that the said prosecutor, while addressing the jury, in speaking of defendant's testimony and its apparent consisteney, further said "that said defendant had had a whole year to concoct his story;" that said prosecutor used said language in presence of the jury for the purpose of influencing said jury against said defendant, as affiant verily believes.

L. C. BURR.
A. F. PARSONS.

Subscribed in my presence and sworn to before me, this 24th day of October, A. D. 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

Affidavit of L. C. Burr and Joel Hull.

In the District Court, Kearney County, Nebraska.

STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

STATE OF NEBRASKA, } ss:
Kearney County, }

L. C. Burr and Joel Hull, being first duly severally sworn, on their several oaths, say: That they were att'ys for the defendant on trial of this action; that on the argument to the jury of this action W. S. Morlan, prosecuting attorney, made use of the following words: "That the attorney of the defense had had the advantage of a whole year to concoct a scheme and story for Simmerman to tell to the jury." L. C. Burr immediately requested the court to require the district attorney to confine his remarks to the evidence in the case. The court refused so to do.

The district attorney then repeated the above statement to the jury in nearly the same language. Burr called the attention of the court again to the words. The court said, "I hear him." Burr then said he exceps to the remarks; and the district attorney then remarked, "You may put it in the record if you want to." Burr said: "I will be compelled to, but do not like to." The district attorney then repeated said statement, and did repeat it in all the several times against the objection of Burr, all of said statements to the effect that att'ys for Simmerman had had a whole year's time to concoct a scheme for the defendant to tell the jury.

Affiants say that this language was calculated to influence the jury against the defendant, as they verily believe.

L. C. BURR.
JOEL HULL.

Subscribed in my presence and sworn to before me, this 24th day of October, 1883.

[SEAL.] J. H. JENSEN, *Clerk.*

87 *Bill of Exceptions.*

In the District Court, Kearney County, State of Nebraska.

THE STATE OF NEBRASKA *vs.* MATHIAS SIMMERMAN.

Be it remembered that on the trial of this cause in the district court of Kearney county, Nebraska, at the October term, 1883, of said court, the State, to maintain the issue on its part, called the several witnesses, as hereinbefore shown; the defendant, Simmerman, to maintain the issue on his part, called as witnesses the several witness as hereinbefore named; and the defendant, having submitted to W. S. Morlan, district attorney, on the 30th day of November, 1883, as by his receipt herein shown, and he having receipted and stated herein that said proposed bill, from pages 1 to 137, "contain all the evidence of every kind offered or given by either party on the trial of said cause," and the foregoing is all the evidence offered or given, and all the affidavits used and read and considered

by the court (by either party) on the trial of said cause, and upon the 4th day of December, 1883, upon showing made, ten days additional time was granted defendant within which to reduce his exceptions to writing, and now upon the application of defendant this bill of exceptions is allowed by me, and ordered to be made a part of the record in this cause this 11th day of December, 1883.

WILLIAM GASLIN, JR., *Judge.*

Filed December 29, 1883.

J. H. JENSEN,
Clerk. of Dist. Court.

STATE OF NEBRASKA, } ss:
Kearney County, }

I, J. H. Jensen, clerk of district court in and for said county, do hereby certify that the above and foregoing is the original bill of exceptions in the case of the State of Nebraska *vs.* Mathias Simmerman.

In testimony whereof I have hereunto set my hand and the seal of said court this 29th day of December, 1883.

J. H. JENSEN,
Clerk Dist. Court.

88 And on the same day, to wit, on the 24th day of January, A. D. 1884, there was issued out of the office of the clerk of the Supreme Court a writ of error in the above-entitled cause, which is in words and figures following, to wit:

Writ of Error.

Supreme Court of Nebraska.

The State of Nebraska to the district court of the eighth judicial district, within and for the county of Kearney, Greeting:

Whereas it is alleged that in the record and proceedings and also in the rendition of judgment in a certain action of indictment, which was lately in our said court before you, wherein the State of Nebraska was plaintiff and Mathias Simmerman defendant, error has intervened to the damage of the said Simmerman, and we, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if final judgment be given thereupon, then without delay you do distinctly and openly, under the seal of your court, annex to and return herewith an authenticated transcript of all judgments of your court in said action, and also all things touching the same, to our supreme court, at the city of Lincoln, on the first day of their next term, to be holden on the 1st Tuesday of July, A. D. 1884, so that, the same being inspected, we may cause further to be done what of right and according to the laws of the land ought thereupon to be done.

Witness, Hon. Amasa Cobb, chief justice of our said supreme court, and the seal thereof hereto affixed this 24 day of January, A. D. 1885.

[SEAL.] GUY A. BROWN, *Clerk.*

89 And afterwards, to wit, on the 18th day of November, A. D. 1884, the following judgment was rendered:

Error from the District Court of Kearney County.

MATHIAS SIMMERMAN, Plaintiff.
vs.
THE STATE OF NEBRASKA, Defendant. } No. 1888.

This cause came on to be heard, was taken up, and argued by counsel, on consideration whereof the court finds there is no error apparent on the record in said proceedings and judgment. It is therefore considered by the court that the said judgment be, and the same hereby is, affirmed, and that the defendant recover of the plaintiff its costs, taken at $12.45, and that a special mandate issue accordingly. It is further ordered that Friday, April 17th, 1885, be, and the same hereby is, appointed as the day for carrying the sentence of the district court for Kearney county into effect, and that the sheriff of Kearney county be, and he hereby is, commanded to carry into effect the aforesaid sentence on said April 17th, 1885.

90 And afterwards, to wit, on the 18th day of November, A. D. 1884, an opinion was filed with the clerk of the court in the above case, as follows:

91 *Opinion. Filed Nov.* 24, 1884.

MATHIAS SIMMERMAN *v.* THE STATE.

MAXWELL, J.:

The case of Simmerman *v.* The State was before this court in 1883 (14 Neb., 568), the judgment of the court below being reversed and the cause remanded for a new trial. A second trial was then had, which resulted in the conviction of the plaintiff of murder in the first degree. The errors relied upon in the plaintiff's brief will be considered in their order:

First: That the court erred in overruling the motion for a change of venue. The motion was supported by four affidavits. That of A. F. Parsons stated in substance that he was an attorney-at-law, residing at Lincoln; that he went to Kearney county prior to the term of court at which the defendant was tried the last time, and was unable to procure the affidavits of citizens of said county as to the bias or prejudice of the citizens; that they told them they would hang Simmerman if he was tried and acquitted, and that Simmerman would not leave Minden alive; that they had ropes in the court-room with which to hang him. L. C. Burr also swears that he is an attorney-at-law, residing in Lincoln; that he has been and is acquainted with the sentiment of the citizens of Kearney county; that the killing of Woods had caused a public discussion in the newspapers of the State of general circulation in said county. A number of extracts from leading papers in the State condemning the murder and tending to excite violence are copied in the affidavit. He also states that one Watkins, editor of one of the county papers of Kear-

ney county, told him that he was employed by an Omaha paper to write a full account of the lynching of Simmerman by a mob, and that the article was then written, even to the date of the hanging. Simmerman also swears that during the former trial guards who had rifles and pistols in sight of the jury were in the court-room, and that a rope was seen there. He also swears that he cannot have a fair and impartial trial in that county by reason of the prejudice of the citizens, his information being derived from the newspapers. Francis Harr also makes an affidavit to the same effect. On the part of the State an affidavit with twenty-four names of residents of the county was filed, stating that there had been a large increase of the population of the county by immigration since the murder was committed of men who knew nothing whatever about the case, and that there was no bias or prejudice against the plaintiff. The Constitution guarantees to every one accused of crime a fair trial before an impartial jury; and whenever it is made to appear satisfactorily from the evidence of leading citizens of the county that there is a bias and prejudice in that county against a party accused of crime so strong as to prevent a fair trial, it is the duty of the court to grant a change of venue—Richmond *v.* State, 20 N. W. R., 282—because if the excitement in a community is great or the bias is so strong as to prevent the jury from dispassionately weighing the evidence and rendering a verdict accordingly, the accused has been deprived of his constitutional rights, and may not have been found guilty upon the evidence alone. Courts should be very careful to see that a fair and impartial trial is had in every case. But a party seeking a change of venue must show by the best evidence that can be obtained the bias and prejudice against him. Thus in Richmond *v.* The State, 20 N. W. R., 282, certain citizens of Plattsmouth made affidavits setting forth how long they had resided there, their several occupations, and means of acquiring knowledge of public sentiment, and then stated from their own
92 knowledge the facts in relation to the bias and prejudice of the public. The affiants swore to facts within their own knowledge; but in this case there is not a single affidavit in support of the motion filed by a citizen of Kearney county. It is true it is stated that the plaintiff was unable to procure such affidavits, but whether or not an effort was made to that effect is left entirely to conjecture. It is possible in some cases affidavits cannot be obtained in the county in support of such a motion, and where such is the case the party must state the facts—that is, what efforts he made to procure the same, to whom he applied, and the reasons given by the several persons whose affidavits were sought for refusing to give the same. Such evidence, while not very satisfactory, may be sufficient to establish bias and prejudice, and show that a fair trial cannot be had; but sweeping allegations of persons residing a great distance from the county, and whose knowledge is derived alone from a casual visit, or from newspapers as to the state of public sentiment therein, is of very little value, and the same may be said of the extracts from newspapers. Most of the papers from which the extracts were taken are of general circulation in the State, and

it is apparent that, with the exception of the Minden paper, have no greater circulation in Kearney county in proportion to population than in the surrounding counties. It will not be contended that because the newspapers have published an account of a murder, and enlarged upon it somewhat, that therefore the person who committed the murder cannot be tried. If that was the law, then the more atrocious the crime the greater the immunity from punishment. As to the arms in the court-room, sworn to by the plaintiff as being seen on a former trial, the purpose does not appear, and there is no presumption of wrong. Such arms should not be permitted in a court-room during a trial, and we cannot believe the judge knew of their existence, and had his attention been called to the matter, undoubtedly he would have ordered them removed. In any event it is not ground for reversal that on a former trial a few guns or other things were left in the court-room during a portion or the whole of the trial. It is due to the judge before whom the case was tried to say that it is to be presumed that if it had appeared to him that from any cause a fair and impartial trial could not be had in Kearney county, that he would have ordered a change of the place of trial. It must affirmatively appear, therefore, that the court erred in overruling the motion, and as it does not, the point is not well taken.

Second. A few days previous to the killing of Woods, one Wray, a resident of Hitchcock county, lost about thirty-five head of horses out of the county The brand on the horses, he states, was a "lazy L." The horses were missing from the county, and as they seem to have been running at large, he stated in substance that he had lost many; that he telegraphed Jack Woods, the sheriff of Hitchcock, who seems to have been at Kearney, "to look out for them, as they were stolen." Two telegrams were sent from Hastings to Kearney, and one from Culbertson to Kearney, and a portion of these dispatches at least were received and answered by Woods. One Nelson, a resident of Hitchcock county, testifies that "in the fore part of October, a year ago," (1882), the plaintiff, with "three others who were about as rough looking fellows as he was, drove a bunch of rough looking horses into my pens on my ranch. I saw them when they were driving them in and started down there, but by the time I got there they had them in and one of the horses caught." He also states that they had about thirty or thirty-five head, and that the only brand he recognized was a "lazy L." He also states that about the 18th
93 or 19th day of October, 1882, he met Wray returning from Minden with the same horses. Also Frank Eldridge, residing in Hitchcock county, testified as follows:

"I had been in the hotel there (at Culbertson) and had my dinner, and was sitting out on the porch in front of the hotel, and some person came out and asked who was the sheriff of the county.

"Q. Who asked that question?

"A. Simmerman—this man here. He asked that question, and some one that stood there pointed to me, and I said 'Jack Woods is sheriff of this county.' Simmerman said 'He is is an Englishman

and a great foot-racer?' I said yes. He said I knew him in Texas. I know him like a book.

"Q. Did you know Jack Woods personally?

"A. Yes, sir; I knew him well.

"Q. State what kind of a man Jack Woods was physically; was he a foot-racer?

"A. Yes, sir; he could run well; there were very few that could outrun him?"

There is also other testimony tending to show that the plaintiff was well acquainted with Woods, and that he was sheriff of Hitchcock county. On the 15th of October, 1882, the plaintiff, with three others, went to Minden, taking with them a portion of the horses belonging to Wray. The plaintiff was armed with two revolvers of 34 and 38 caliber, and with a knife. Belmont, one of his companions, carried four revolvers. It is pretty evident, too, from the testimony that they made no secret of the number of weapons they carried, the plaintiff, in particular, having shown his to certain residents of the town. Belmont and the plaintiff took supper at the Commercial Hotel, in Minden. One Minnie Dobson, who was in the dining room while they were at supper, testifies as to their conduct there as follows:

"Q. State where you saw him (Simmerman).

"A. I saw him in the Commercial Hotel in this town in the dining-room.

"Q. State whether the defendant here made any remarks there about being arrested.

"A. He did at the supper table. They were at the table eating their supper. They were blackguarding and talking noisy, and my husband came in and attended to them; then they talked between themselves not quite so loud. I was brushing off the other table, and I heard some words that I thought were not right, and I listened to it. Simmerman said to Belmont, 'You know what we are looking for and what we must do. You want to keep your eyes skinned, and the first damned son of a bitch that walks up to arrest you shoot him like a dog. Don't let him get the drop on you.'

"Q. What arms did they have?

"A. Each had a six-shooter; they were lying on their laps. They sat facing each other, so one could look into the kitchen and the other into the dining-room."

Also one Carson testified that on the evening of the 15th of October, 1882, seeing a light in the court-house at Minden, the plaintiff "wanted to know who was under arrest for stealing horses." I said Wray was. He said, "The first damned son of a bitch that tried to arrest him for horse-stealing he would kill him, or he would kill him."

About six o'clock on the evening of the 16th of October, 1882, the plaintiff and Belmont went into the dining-room of the Prairie Home, a hotel in Minden, and sat down at the table to eat supper, each one drawing a revolver and laying it on his lap. There is a

conflict in the testimony as to their relative positions, the plaintiff and a number of witnesses stating that the plaintiff sat at the right of Belmont, while an equal number of witnesses testify that he sat at the left. While they were at supper Jack Woods came in and stepped up to them, and saying that they were to consider themselves under arrest. The testimony of the landlord who was waiting on the table and saw the entire affair is very clear as to the relative situations of the parties and what transpired, and is as follows:

"I was waiting at the table at the time; several were there eating supper. Just as they were sitting eating I saw these two men,
94 Simmerman with another man, come to the door, and they soon sat down to supper.

"Q. Did they have any arms on their persons?

"A. Yes, sir; they had two revolvers or three, and a big knife. They took a napkin and laid it in their laps, and laid their revolvers in their laps. Then a man came in and shut the door after him and walked in between them and told the man on the east to hold up his hands. Then the fellow on the west grabbed Woods by the arm and threw him round so that he faced him, or to the west. Then the fellow on the east shot him in the back, and the fellow on the west said 'Give him another one and shoot him dead.' Then another ball was fired and the lights went out."

On cross-examination he testified that the plaintiff sat to the left of Belmont, and that Woods placed his left hand on the plaintiff's shoulder and put his right hand in between them and said, "Throw up your hands," and "You are my prisoners." This testimony is corroborated by a number of witnesses, and by the wounds that caused the death of Woods, both of which were in the back. The testimony showing that the plaintiff killed Woods is clear and conclusive, and the jury were not only justified in finding that the plaintiff was guilty of the murder, but could not well have found otherwise. But it is said that even if he did kill Woods that he did so while resisting an unlawful arrest and therefore was justified, and that evidence that certain horses were stolen and in possession of the plaintiff and Belmont was improperly admitted. The object of this evidence was to show that certain horses had been stolen and that a portion of them, at least, were in the possession of the plaintiff; in other words, that the plaintiff was guilty of felony. This, in connection with the evidence that the plaintiff, on the previous day, had threatened to kill any one that attempted to arrest him, and that he was well acquainted with Woods, and knew that he was the sheriff of Hitchcock county, shows that the plaintiff was expecting an attempt to arrest him, and also shows an intention to kill whoever should make the attempt. The evidence, therefore, was properly admitted as showing a cause for attempting to make an arrest, as well as the threats to kill. It is objected, however, that Wood had no warrant, and was acting in a county where he had no official character, and, therefore, he was without authority. Sec. 284 of the Criminal Code provides that any person not

an officer may, without warrant, arrest any person if apetit larceny or felony has been committed and there has been reasonable ground to believe the person arrested guilty of such offence and may detain him until a legal warrant can be obtained. "The testimony shows that Wood was the sheriff of Hitchcock county; that he had been informed by telegraph that the horses in possession of the plaintiff and Belmont had been stolen, and finding them in their possession certainly was sufficient to lead him to believe that they were the thieves. He, therefore, was justified in attempting to arrest them. In saying this, we do not intend to modify the opinion in Simmerman *v.* The State, 14 Neb., 568. A person may resist an unlawful attempt at arrest and, if necessary, rather than submit, may lawfully kill the person making it—that is, there must be a cause for making the arrest—a crime committed—and reasonable ground to believe that the person sought to be arrested committed the offence. When these conditions exist the law clothes any person with power to make the arrest until a warrant can be obtained. As these conditions existed in this case the attempt of Wood to arrest the plaintiff was not unlawful, and is no justification for the murder.

In addition to this, it is apparent that the plaintiff was expecting to meet Woods, as there is evidence tending to show that on the day preceding the murder, when some one mentioned the name of
95 Wood, both Belmont and plaintiff placed their hands on their revolvers. Some one then asked, what Wood? Just then lawyer Wood, of the town, came up, and someone called him by name, when Belmont and plaintiff went away, evidently showing that they supposed the person spoken of was the sheriff of that name.

3rd. Misconduct of the district attorney in speaking of the plaintiff to the jury as "Billy, the Kid, or Jesse James sort of a cowboy." The plaintiff, in his testimony, had freely stated that he had been tending stock in New Mexico and on the plains; that he carried two revolvers and a butcher knife, and that his companion, Belmont, carried four revolvers. It is also apparent that the plaintiff displayed his weapons with something approaching braggadocio, and, in fact, by his conduct, justified the district attorney in speaking of him in the way he did. Peaceable and law-abiding men do not find it necessary, in a peaceable community, to load themselves down with deadly weapons, and their conduct is open to criticism when they do so. There was no error, therefore, in using the words complained of.

4th. Objections are made to the instruction, but it would subserve "w[illegible] good purpose to review them at length, as we find no error in
He[illegible]m. It is very clear from the evidence that the plaintiff intended to kill Wood or any one who attempted to arrest him, and that, in pursuance of that intention, the shots were fired by him, and that they were the cause of the death, thus making deliberate and premeditated murder.

The plaintiff has had a fair trial, and there is no doubt of his guilt, and there is no material error in the record. The judgment is affirmed.

96 And afterwards, to wit, on the 3rd day of December, A. D. 1884, the following objections of the plaintiff in error to the judgment of the supreme court and the execution thereof was filed with the clerk of the court in words and figures following, to wit:

97 *Objections of Mathias Simmerman to the Judgment of said Court and to the Execution of the Judgment of the said Court, and to any Order which the Court has or may Make Fixing a Day for the Execution of the Same.*

In the Supreme Court of the State of Nebraska.

MATHIAS SIMMERMAN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.

Comes now the said plaintiff in error and objects to the judgment of the said court and to the execution of the same, and to any order which the court has or may make fixing a day for the execution thereof, for the reasons following:

1st. That it appears from the face of the judgment and record herein that the plaintiff in error has been deprived of his constitutional right to a speedy and public trial by an impartial jury of the State and district wherein the said murder is alleged to have been committed, as guaranteed to him by article six of the amendments to the Constitution of the United States.

2nd. It appears upon the face of the judgment and record of this court that said Woods was attempting to deprive the plaintiff in error of his liberty without due process of law, and that said pretended arrest, as well as the laws of the State of Nebraska, section 284 of the Criminal Code, and the alleged verdict of the jury, and the judgment of the said trial court, and the judgment of this honorable court, are and were in conflict with and prohibited by the fourth, fifth, sixth, and fourteenth articles of amendments to the Constitution of the United States, and that they and each of them are therefore void, and that plaintiff in error has been held to answer for the crime of murder, and has been tried and illegally found guilty of murder in the first degree and sentenced to be hung, and if execution would deprive the plaintiff in error of his constitutional right to resist an unlawful arrest, and be compelled to submit thereto without due process of law, and be further compelled to submit to a trial of his rights for murder in the first degree to a prejudiced and biased jury, which was and is in conflict with and prohibited by the said articles of amendments to the Constitution of the United States, and it is again claimed by the plaintiff in error that the said conviction and sentence in this case are void, upon the ground that they are repugnant to that clause of the fourteenth amendment to the Constitution of the United States which is in the words following: "Nor shall any State deprive any person of life, liberty, or property without due process of law;" also article four thereof in these words: "The rights of the people to be secure in their persons * * * against unreasonable searches and seizure shall not be

violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing * * * the person or thing to be seized."

Wherefore plaintiff in error prays this honorable court to grant to him a writ of error to the Supreme Court of the United States; and he will ever pray.

MATHIAS SIMMERMAN.
By L. C. BURR, *His Attorney.*

Endorsed: Mathias Simmerman *vs.* The State of Nebraska. Objections to the judgment of said court and to any order fixing the day for execution thereof. Filed Dec. 3, 1884. Guy A. Brown, clerk. L. C. Burr, for pl'ff in error.

98 And on the same day, to wit, on the 3rd day of December, A. D. 1884, the following affidavits were filed by plaintiff in error with the clerk of the court, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

MATHIAS SIMMERMAN *vs.* THE STATE OF NEBRASKA.

STATE OF NEBRASKA, } ss:
Lancaster County, }

C. D. Woolworth, being first duly sworn, on his oath says: That he is a brother of James M. Woolworth, of Omaha, Nebraska; that on and for a long time prior to the first day of August, A. D. 1882, this affiant was the secretary and manager of the Palo Blanco Cattle Company, a company doing business in the Territory of New Mexico, and whose post-office address was Springer, Colfax county, New Mexico. Affiant further says that said company was during the year aforesaid (1882) herding a large number of cattle at said place near and about Chico ranch, and it was necessary to, and said company did, employ a large number of men to attend to said cattle, and among the said men so employed was one Mathias or Matt Simmerman, the plaintiff in error in this case, and the said Simmerman continued in the employment of said company, and was in their employ and at their said ranch until and on the first day of August, A. D. 1882, aforesaid, when the said Simmerman quit the employment of said company. Affiant is positive of the said day and the fact of said Simmerman quitting the said company, for the reason that on said day this affiant paid to him all his wages up to that date, and gave him a written check or draft of the said company on a bank, which said check bears date of August first, 1882; also this affiant, as the said secretary and manager of the said company, then had and yet has the possession and control of the books of said company, and these books show that the said Simmerman left and quit the employment of the said company on said August 1st, 1882, and commenced in their employment, as hereinafter stated, and up to which, say and between said dates, the said Simmerman was not out of the employment of the said company, but working for them all of said time in the said county of Colfax, in said Territory, nor, as affiant verily be-

lieves, was he away from or out of the cattle range of the said company since his employment by them; the said Simmerman was first employed by the said company on the 1st day of March, A. D. 1882, and continued in their said employment until the said first
99 day of August, A. D. 1882; and further affiant saith not.

CHARLES D. WOOLWORTH.

Subscribed in my presence and sworn to before me this 24th day of November, 1884.

ENOCH A. WHIPPLE,
Notary Public.

In the Supreme Court of the State of Nebraska.

MATHIAS SIMMERMAN *vs.* THE STATE OF NEBRASKA.

STATE OF NEBRASKA, } ss:
Buffalo County, }

Mathias Simmerman, being first duly sworn upon his oath, says he is the prisoner in this action; that on the first day of March, 1882, and, as affiant believes, prior thereto, he commenced working for the Palo Blanco Cattle Company, a company doing business in the Territory of New Mexico, but the post-office address of which this affiant was not acquainted with, nor was affiant acquainted with any member of said company, nor of their address; that affiant was employed by said company upon a ranch called Chico Ranch, and was so employed all of the time continually and upon each day from the first day of March, 1882, to the first day of August, 1882, and was not out of nor away from said ranch during all of said time, upon which last-named day affiant quit the said employment of said company, and was paid my salary due me up to that date by a check of said company through its manager and secretary, Charles D. Woolworth; that this affiant was most closely questioned by L. C. Burr, my attorney in this case, of the names of this company for whom affiant was working, as aforesaid, after the supreme court of this State reversed this action in the fall of 1883, which opinion was filed in this court upon the — day of ———, 1884; that immediately and upon the 15th day of October, 1883, the district court of Kearney county convened, and affiant was put upon his trial; that affiant had no knowledge that the witness, Wray Eldredge, and others were going to testify of or about supposed conversations claimed by them to have taken place in the State of Nebraska in the summer of 1882, or at any of the dates claimed by them in the records in this action. Affiant says he did not know Charles D. Woolworth by name nor by address; that he only knew him by sight; that while talking with affiant's counsel pending the said trial at Minden in October, 1883, and while affiant was speaking of an English company for whom affiant was working, said counsel asked affiant if a man by the name of Woolworth had anything to do with this English company, and then for the first time could affiant remember even the last name of said Woolworth, of which

affiant was not then positive, and said Woolworth must have then been in New Mexico at some point where affiant could not and did not know how to address him, and affiant can now show by documents, entries in the books, check-books, and evidence of Charles D. Woolworth that each of said witnesses for the State, Wray, Eldridge, and all others are entirely and flatly mistaken in the identity of the man they claim to have talked with, and whose incompetent evidence has been received in this case of several conversations about Jack Woods occurring in Nebraska when affiant was in New Mexico, as by said books, checks, and evidence of said Woolworth will certainly establish, and which said evidence affiant could not procure and offer to the trial court, because he could not and did not learn the address or whereabouts of said Woolworth nor said company until in the month of January, 1884, and long after the bill of exceptions in this case was signed and settled by the trial court, and no amount of diligence, no matter how great, on the part of affiant could have gone to New Mexico and found the said Woolworth or said company and got back to Minden with his affidavit, the distance being about 1,500 miles away from railroads, and reached only by stage travel, and it is only since the said trial that affiant has discovered said evidence of said Woolworth; and this affiant further says that when he was paid off by said Woolworth he started home overland, and came all the way by and on a horse, the distance being not less than about 1,500 miles; that no person could travel such distance in less than sixty days; that affiant arrived at his father's home in the State of Kansas, and stayed at Fort Dodge, as in my testimony stated; and further affiant saith not.

MATHIAS SIMMERMAN.

Subscribed in my presence and sworn to before me this 29th day of November, 1884.

[SEAL.] O. L. GREEN,
Notary Public.

In the Supreme Court of the State of Nebraska.

MATHIAS SIMMERMAN *vs.* THE STATE OF NEBRASKA.

STATE OF NEBRASKA, }
Lancaster County, } *ss:*

L. C. Burr, being first duly sworn on his oath, says: That he is counsel for plaintiff in error in this action; that he has read the affidavit of said Simmerman filed in this court in support of newly-discovered evidence, and that all parts thereof that speak of and relate to this affiant *is* true. Affiant further says that the said Simmerman has been, during all the time that affiant has acted for him, without money or means to carry on a proper defense of this action; that most all of the said time the said Simmerman has been confined in the county jail at Kearney, in Buffalo county, about 150 miles from Lincoln, Neb., where affiant resides; and during the said time affiant has experienced considerable difficulty in obtaining in-

formation of any kind from said Simmerman; that during the last trial of this action to a jury affiant closely questioned the said Simmerman for the names of persons or parties that he had worked for in New Mexico, and all the information that he could give affiant was that of an English company, which said company dissolved in the summer of 1883, leaving its books in the hands of said Woolworth. Finally this affiant asked the said Simmerman if a man by the name of Woolworth had anything to do with said company, and he replied that he believed he did, but was not sure, yet he could not give affiant any information as to who or where this person could be found or his address obtained, but thought that sometimes he went to Omaha, Neb., at certain times of the year; affiant wrote a letter from the said town of Minden at that time to James M. W. Woolworth, who lived at Omaha, enquiring of said facts, and within ten days after the said trial affiant went to Omaha and called on the said J. M. Woolworth; but all that affiant could learn from him was that he had a brother, C. D. Woolworth, who was manager of a cattle company in New Mexico, and while affiant was then at Omaha wrote a letter to the said C. D. Woolworth, and it was not until the 20th day of January, 1884, that affiant could receive any information whatever from him; but about said day affiant received a letter from him which is hereto attached, marked "A," and made a part of this affidavit. Affiant says that he followed the only clue he had and could obtain, and that the facts herein stated are all the
101 facts that he knew or found out that would show conclusively that the witnesses for the State in this action *was* mistaken by swearing that Simmerman was in the State of Neb. or any other place than New Mexico in the month of June or the summer of 1882, as testified by the said Wray, and particularly Eldredge and other witnesses for the State; and affiant further says that when he received the said letter the said bill of exceptions herein had been settled by the trial court, and the district court had lost jurisdiction of this action, and these facts could not nor cannot be shown to any court but this honorable court. Affiant further says that about the 15th day of September, 1884, affiant went to Omaha and saw the said C. D. Woolworth and had a conversation with him concerning the said Simmerman and this action, and he then stated to affiant that it was simply impossible that said Simmerman was in Nebraska or out of the Territory of New Mexico the times and dates hereinbefore mentioned.

L. C. BURR.

Subscribed in my presence and sworn to before me, this 3rd day of December, 1884.

[SEAL.] L. P. YOUNG,
Notary Public.

Endorsed: 1888. Simmerman *vs.* The State. Affidavits of C. D. Woolworth, Mathias Simmerman, and L. C. Burr. Filed Dec. 3, 1884. Guy A. Brown, clerk. L. C. Burr, for pl'ff in error.

102 And afterwards, to wit, on the 15th day of December, A D. 1884, the plaintiff in error filed with the clerk of the court a motion for rehearing and briefs, which are in the words and figures following, to wit:

Defendant in Error Brief.

In the Supreme Court of the State of Nebraska.

MATHIAS SIMMERMAN, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.

Motion for rehearing and objections of Mathias Simmerman to the execution of the judgment of said court, and to any order which the court has or may make fixing a day for the execution of the same.

Comes now the said plaintiff in error and moves the court here for a rehearing of the said action for the reasons following:

I.

That it appears upon the face of judgment and record herein that the plaintiff in error has been deprived of his constitutional right to a speedy and public trial by an impartial jury of the State and district wherein said murder is alleged to have been committed, as guaranteed to him by article VI of the amendments to the Constitution of the United States.

II.

The court appears to have mistaken the evidence as appearing in the bill of exceptions, by saying that "one Wray telegraphed Jack Woods, sheriff of Hitchcock county, who seems to have been at Kearney, (to look out for them as they were stolen.") Upon the trial of this action there was an attempt to violate every rule of evidence ever laid down by respectable authority to show the contents of these two telegrams, and even the trial court directed and ordered all such testimony to be taken from the jury, and we are for the first time informed, by the opinion in this case, what the contents thereof were, and it is expressly affirmatively shown that no diligence was attempted to obtain these two important documents, and if the trial court refused to allow the contents to be stated to the jury, we are at a loss to understand how this court has received its information. If there is no proper evidence in the record of the contents of these telegrams, then the opinion of the court is erroneous, and we have no evidence of the belief of Jack Woods, nor the basis of his belief, that the plaintiff in error had been or was accused of a felony, and basing his belief upon nothing, or worse than nothing, mere supicion, is not sufficient to deprive Simmerman of his constitutional rights to resist such unlawful arrest.

III.

It appears from the face of the judgment of this court that said

Jack Woods was attempting to deprive the plaintiff in error of his liberty without due process of law, and that the said pre-
103 tended arrest, as well as the said laws of Nebraska, section 284 of the Criminal Code, and the alleged verdict of the jury, and the judgment of the said trial court, and the judgment of this honorable court are and were in conflict with and prohibited by the fourth, fifth, sixth, and fourteenth articles of amendments to the Constitution of the United States, and that they, and each of them, are therefore void, and that plaintiff in error has been held to answer for the crime of murder, and has been tried and illegally found guilty of murder in the first degree, and sentenced to be hung, and if executed would deprive the plaintiff in error of his constitutional rights to resist an unlawful arrest, and be compelled to submit thereto without due process of law, and it is here (as heretofore) claimed by the plaintiff in errror that the conviction and sentence in this case are void upon the ground that they are repugnant to that clause of the Fourteenth Amendment to the Constitution of the United States which is in these words: "Nor shall any State deprive any person of life, liberty, or property without due process of law;" also article four thereof in these words: "The right of the people to be secure in their persons * * * against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing * * * the person or things to be seized;" and also article six thereof in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." * * * Is the section of Nebraska's Criminal Code heretofore named in conflict with these constitutional rights? Will this court yet say that a private person, having no knowledge of a felony—and, as this record truly shows, Woods based his knowledge upon the receipt of a telegram, the contents of which we know nothing—does this create reasonable grounds for Woods' believing that Simmerman was guilty of a felony? Did Woods have actual belief, based on actual facts, creating reasonable cause? No, he did not, and this record squarely shows it. Does the mere receipt of a telegram or postal card by an officer from a stranger authorize him to go out of his official jurisdiction and arrest the first stranger he meets, and deprive that stranger of his rights guaranteed by the Federal Constitution, that he shall not be deprived of his liberty without due process of law? Is this section of the Nebraska Criminal Code constitutional? Is it in conflict with the right of Simmerman to demand that when Woods had ample time and opportunity to procure a warrant, based upon his own or other affidavit, that he must do so? The district court is open and holding its regular term; the county court is always open, as well as the justice of the peace. Shall Woods take the law into his own hands or shall the powers of these courts be brought into action? The "horses had been stolen" over a month, a stale pursuit, and the law of the land forbids this arrest under these circumstances.

The words, "by the law of the land," do not mean a statute passed for the purpose of working a wrong.

Lord Coke, in his commentary upon this statute, says: "That by these words 'the law of the land' mean 'due process of law,'" which he afterwards explained to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law * * * and according to the course of the common law."

Taylor *vs.* Porter, 4 Hill, N. Y., 145–6: "If you cannot take property away from a man by an act of the Legislature you surely cannot take his liberty away from him without due process of law."

104 And again, in p. 147, same case: "No person shall be deprived of life, liberty, or property without due process of law." The words "due process of law" in this place cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities of ascertained guilt. It will be seen that the same measure of protection against legislative encroachment is entended to life liberty and property, and if the latter can be taken without forensic trial and judgment there is no security for the other. If the legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death. But these things cannot be done; there must "be due process of law."

And in Pennoyer *vs.* Neff, in 5 Otto, p. 733, the court says: "Such judgments may be directly questioned, and their enforcements in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligation of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace any permissible exertion of power affecting private rights and exclude such as is forbidden there can be no doubt of their meaning when applied to judicial proceedings; they then mean a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant he must be brought within its jurisdiction by service of process within the State or his voluntary appearance."

Again, in A. & N. R. R. *vs.* Baety, 6 Nebraska, p. 42, the court says: "This common-law right is secured by our Constitution. It declares that no person shall be deprived of life, liberty, or property without the process of law. The terms 'due process of law' and 'the law of the land,' one or the other of which is found in all constitutions of the States, are said to mean the same thing. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the Government. Hence these terms do not mean merely legislative enactments, for if they

did every restriction upon legislative authority would at once be abrogated, for what more can a citizen suffer than be taken, imprisoned, disseized of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; be deprived of his liberty and life without crime. Yet all this must he suffer if an act of the assembly simply denouncing these penalties upon a particular occasion or a particular class of persons be in itself the law of the land, within the sense of the Constitution. Webster interpreted these terms to mean everything which may pass under the form of an enactment of the Legislature; [it] is not, therefore, to be considered as the law of the land. There would be no general, permanent law for the courts to administer or even to live under."

5 Webster's Works, 487.
State *vs.* Doherty, 60 Me., 509.
Commonwealth *vs.* Bryne, 20 Gratt., 165.
Bank of Columbia *vs.* Okeley, 4 Wheat., 243.

It is true that the Legislature possesses all the legislative power of the State, but, as is said in Taylor *vs.* Porter, 4 Hill, under our
105 system of government the Legislature is not supreme, and, therefore, the safety of life, liberty, and property lay at the foundation of the civil compact. This one great end of government is the protection of the absolute rights of individuals, the life, liberty, and property of each citizen of the State, and for a full and able discussion of the constitutional rights of individuals and the meaning of "due process of law," and to "the law of the land." See Hurtado *vs.* California, Supreme Court Reporter, March 19th, 1884, p. 111; Kring *vs.* Missouri, 17 Otto, p. 221.

Of the arrest of an individual, Blackstone says: "An arrest may be made four ways—(1) by warrant, (2) by an officer without warrant, (3) by a private person, also without a warrant, (4) by hue and cry." Cooley's Blackstone, vol. 2, book IV, star, page 290.

Ans., star, p. 292 (by note): "It may be observed as a general rule that if the warrant be materially defective, or the officer exceeds his authority in executing it, and if he be killed in the attempt, this is only manslaughter in the party whom he endeavors to arrest." 1 East. P. C., 310; 1 Leach, 206; 6 T. R., 122; 5 East., 308; 1 B. &. C., 291.

"A private person can only make an arrest that is present when any felony is committed, and if either party kill the other in the attempt, it is manslaughter, and no more. 2 Hal. P. C., 82, 83. It is no more, because there is no malicious design to kill, (star, page 293), but it amounts to manslaughter. It would be of most pernicious consequence if, under pretence of suspecting felony, any private person might break open a home or kill another, also because such arrest upon suspicion is barely permitted by the law, and not enjoined as in the case of those who are present when a felony is committed."

And a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods on the mere assertion of one of the principal felons.

2 Stark., 167.

A police officer found N—— with potatoes under his shirt, which had been recently dug, and arrested him; the policeman called O to assist him; O did so; and a rescue being attempted, O was going away, and was struck by A, who went away, and O was afterwards killed by another person who attempted the rescue. It was held the police officer had no right to arrest N——, and that the killing of O, therefore, did not amount to murder.

American Crim. Law, vol. 2, sec. 981.
Wharton *vs.* Horn, page 54–92.

Again, your honors, plaintiff in error ought to have a new trial, for the reason that he has new evidence discovered since the trial was had, and which he could not produce, nor be expected to produce, under the circumstances at his trial—the books, checks, and documentary evidence of the Palo Blanco Cattle Company of New Mexico and the affidavits of Charles D. Woolworth, the secretary and manager thereof, as well as the affidavits of plaintiff in error and L. C. Burr. It is fully, clearly, and most satisfactorily shown to the candid mind of the court that Simmerman can now show to your honors that almost two pages of your opinion is based upon statements that can be shown to be absolutely untrue, and can show to your honors this most important fact, to wit, that Simmerman was in the Territory of New Mexico on the 24th and 25th days of September, 1882, the very day which Wray says he lost or his horses were stolen. See his evidence, p. — of bill of exceptions. This unfortunate man now brings forward to your honors positive, respectable, and documentary evidence that at the date the supposed owner of the horses says they were stolen that he was 1,500 miles from the county wherein the supposed felony occurred, and had been there from the
1st day of March prior and to August 1st subsequent
106 thereto. If facts, cold and intelligent, rising up like a monument of marble, appealing to the good judgment of this court for its merciful help, aid, and protection, can ever be presented in more forcible and convincing manner than these, then we say that justice is blind; that the liberty of an individual is of no account; that he may be imprisoned, disseized of his property, liberties, and privileges; be outlawed, exiled, and destroyed; hanged by an order of this court to satisfy the savage and ungovernable clamorings of the worst class of Kearney county and Republican Valley. We well know that this court is not a court of original jurisdiction in certain of its powers to hear and determine a cause, but we understand as well as your honors that you have the power to reverse this verdict, which you now know was obtained, to say the least, upon mistaken evidence of Wray and Eldridge. Sec. 491 of the Criminal Code says: "Applications for a new trial shall be by motion, upon written grounds filed at the term the verdict is rendered, and shall except for causes of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, *or* (be) within three days after the verdict is rendered."

Simmerman had not been within 1,500 miles of the place where these horses were said to have been stolen on the 25th or 26th of September, 1882, nor of the places where said conversations are said to have taken place. Will this court say that he must anticipate that some witnesses would have the courage to swear upon his oath that he was 1,500 miles from the Chico Range? For newly discovered evidence the section above expressly gives an utter indefinite time to file a motion for a new trial after the lower court has lost jurisdiction of the case by the writ of error, which occurred in this case before the name and address of Mr. Woolworth could be found. Will this court say that we must bring some sort of action in the lower court to get another motion for a new trial, or is it the most orderly, convenient, and proper way to file this application with this court? Upon this question we are satisfied that the supreme court has original jurisdiction to hear and pass upon a motion for a new trial under these circumstances. All of which is most respectfully submitted.

L. C. BURR,
For the Motion.

107 And afterwards, to wit, on the 22nd day of January, A. D. 1885, the following order was made overruling the motion for rehearing:

Error from the District Court of Kearney County.

108 Supreme Court of Nebraska. January 2d Term, A. D. 1885.
January 22, 23, 1885.

MATHIAS SIMMERMAN
vs.
THE STATE OF NEBRASKA. } No. 1888.

This cause came on to be heard upon a motion by plaintiff for a rehearing, on consideration whereof the court finds there was no error in its former judgment. It is therefore considered by the court that the said motion should be, and it hereby is, overruled.

And this cause coming on further to be heard upon an application by plaintiff for the allowance of a writ of error from the Supreme Court of the United States, and the court finding that there is no Federal question presented by the record, it is considered by the court that said application should be, and it hereby is, denied.

STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court, do hereby certify that the above is a true, correct, and complete transcript of the papers, pleadings, and proceedings in the supreme court in the case of Simmerman against The State of Nebraska, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 9th day of August, A. D. 1885.

[Seal Supreme Court of Nebraska.]

GUY A. BROWN, *Clerk.*

109 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mathias Simmerman, plaintiff in error, and the State of Nebraska, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
110 or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) SAM. F. MILLER,
Justice Sup. Court United States.

111 [Endorsed:] Mathias Simmerman *v.* The State of Nebraska. Copy. Writ of error. Filed March 3, 1885. Guy A. Brown, clerk.

Endorsed on cover: Nebraska supreme court. No. 931. Mathias Simmerman, plaintiff in error, *vs.* The State of Nebraska. Filed September 7, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

MATHIAS SIMMERMAN, *Plaintiff in Error*,
vs.
THE STATE OF NEBRASKA. } No. 931.

Motion to Dismiss.

Now comesthe defendant in error and moves the Court to dismiss the writ of error in this cause for the reasons following, to wit:

First. The Court is without jurisdiction to review the judgment contained in the record brought up in this cause, there being no Federal question presented.

Second. Since the writ of error herein was allowed and served, the plaintiff in error escaped from the custody of the officers of the State having him in charge, and said plaintiff in error is now at large.

WM. LEESE,
Att'y Gen'l Neb.
ENOCH TOTTEN,
Counsel.

SIR: Please take notice that on Monday the —— day of November, 1885, at the opening of Court on that day, or as soon thereafter as counsel can be heard, a motion, of which the foregoing is a copy, will be submitted by us to the Supreme Court of the United States for its decision.

Annexed hereto is a copy of our brief or argument in support of said motion.

WM. LEESE,
Att'y Gen'l of Nebraska.

To L. C. BURR,
Att'y for Pl't'ff in Error.

ENOCH TOTTEN,
Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

MATHIAS SIMMERMAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA. } No. 931.

Brief on Motion to Dismiss.

The plaintiff in error, in October, 1883, was indicted by the grand jury of Kearney county, in the State of Nebraska, for the murder of one Jack Woods. It appears that he was twice tried and convicted; the first judgment was set aside on appeal. He was again tried and convicted, and was by the Court sentenced to death.

This cause was removed to the Supreme Court of the State on a writ of error, and the judgment was affirmed.

The cause was then removed into this Court by writ of error, and the defendant in error moves to dismiss the writ, because there is no Federal question presented or involved, and also because the plaintiff in error, since the writ was served, has escaped and is now at large.

I.

In the first place, this Court has no jurisdiction to re-examine the judgment in this cause. Before such jurisdiction can be exercised, it must appear from the record, affirmatively or by fair implication, that a Federal question necessary to the determination of the cause is involved. (*Boughton* vs. *Exchange Bank*, 104 U. S., 427.) No such question appears. The plaintiff in error was charged with the crime of murder, and was indicted by a grand jury. He was arraigned and pleaded "not guilty." Upon the issue thus made he was tried and convicted. He removed the cause on writ of error to the Supreme Court of the State, and there the judgment was affirmed. In his petition to the Supreme Court of the State, in which alleged errors are assigned (R., p. 1) there is no suggestion of a Federal question. The only allusions to such a question are to be found in documents presented to the Supreme Court of the State after the judgment of affirmance. One of these was an application for a writ of error to this Court, filed Dec. 3, 1884, (132) and the other was a petition or motion for a rehearing filed on the 15th of December, 1884. In the latter of these papers (137) we find the following, which we presume states the ground relied upon to sustain the jurisdiction here:

> "It appears from the judgment of this Court, that said Jack Woods was attempting to deprive the plaintiff in error of his liberty without due process of law, and that the said pretended arrest, as well as the said laws of Nebraska, section 284 of the Criminal Code,

and the alleged verdict of the jury and the judgment of the said trial Court, and the judgment of this honorable Court, are and were in conflict with, and prohibited by, the fourth, fifth, sixth and fourteenth Articles of Amendment to the Constitution of the United States."

It has so frequently been held that the fourth, fifth, and sixth amendments to the Constitution operate as limitations upon the general Government, and not upon the States, that it is hardly necessary to allude to the authorities.

Twitchell vs. *Commonwealth*, 7 Wall., 321;
Fox vs. *Ohio*, 5 How., 434.

Section 284 of the Criminal Code of Nebraska, which is complained of, provides that any person not an officer may, without warrant, arrest any person, if a petit larceny or felony has been committed, and there has been reasonable ground to believe the person arrested guilty of such offence; and may detain him until a legal warrant can be obtained. (R. 132).

On the motion for a reargument in the Supreme Court of the State (138), it was urged that this statute was in violation of some or all of the Amendments to the Constitution of the United States mentioned.

So far as the objections of the plaintiff in error rest upon this statute, they are disposed of by the case of *Twitchell* vs. *Commonwealth*, (7 Wall., 321,) which is precisely in point. Neither the fourth, fifth nor sixth amendments have any application here, because those amendments are limitations on the power of the general government exclusively. But if this were not so, would a statute of a State authorizing a suspected person to be apprehended without a warrant, and to be held "until a legal warrant can be obtained," be considered repugnant to the Constitution of the United States?

Is such an arrest or detention the kind of deprivation of liberty the constitutional provisions were designed to prevent?

(See *Ex parte* Bigelow, 113 U. S., 328.)

The fourteenth amendment does operate upon the States, as a limitation of power; but whether it reaches such a case as this or whether it is confined in its operation to State legislation relating to the colored race (*Virginia* vs. *Rives*, 100 U. S., 313), we need not now stop to inquire. At most then, we have to deal with the fourteenth amendment.

Of course, it will not be pretended that the plaintiff in error has been deprived of his liberty without due process of law so far as this case is concerned. An indictment, arraignment and a public trial by a jury, with counsel of his own selection to defend him, surely constitute "due process of law."

It seems to be in the mind of counsel that these constitutional provisions may be invoked because of the fact, or the supposed fact, that when the plaintiff in error killed Woods, he (Woods) was attempting to arrest or had arrested him unlawfully, without a warrant, and hence was endeavoring to deprive the plaintiff in error of his liberty without "due process of law." Or, in other words, this Court is invited to base its appellate jurisdiction on an allegation of arrest without due process of law, which arrest took place, if it took place at all, prior to the indictment and arrest in this case.

At best, this unlawful arrest, if it was such, could amount to no more than a defence on the trial of the issues upon the indictment. Indeed, it is apparent from the record that this was one of the main grounds of defence on the trial, and that it was fully considered and passed upon both by the

Court and the jury. (R. p. 9.) The Supreme Court of the State also reviewed this branch of the case. (131.)

The plaintiff in error therefore had the full benefit of this defence, and the full protection of the law. He made all his defences before the Trial Court, and the matter which we suppose he relies on here, to wit, that he acted in self-defence, was one of them. He had the benefit of a review of all the questions by the highest court of the State. The Trial Court had jurisdiction to try the cause. Exceptions were taken based on alleged errors occuring on the trial, and these were brought before the Appellate Court in the usual way, and that court held that there were no errors in the record.

The language of this Court in a recent case growing out of a trial and conviction in the Supreme Court of the District of Columbia, is applicable here:

> "But that court had jurisdiction of the offence described in the indictment on which the person was tried. It had jurisdiction of the person, who was properly brought before the court. It had jurisdiction to hear the charge and evidence against the prisoner. It had jurisdiction to hear and decide upon the defences offered by him. The matter now presented was one of those defences. Whether it was a sufficient defence was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury, under the instructions of the court, must pass, if we can suppose any of the facts were such as required submission to the jury."
>
> *Ex parte* Bigelow, 113 U. S., 328.

II.

In the second place, the plaintiff in error, having escaped and fled, cannot maintain his writ of error. The defendant in error is entitled to an order dismissing the writ.

Commonwealth vs. *Andrews*, 97 Mass., 544;

Smith vs. *U. S.*, 94 U. S., 97;

Sherman vs. *Commonwealth*, 14 Grattan, 677 ;
People vs. *Gov'mt*, 59 N. Y., 80 ; 55 Cal., 290 ; 10 Bush, 26 ; 57 Miss., 14 ; 10 Texas., 118 ; 121 Mass., 372.

It is submitted that the writ of error should be dismissed for both reasons.

WM. LEESE,
Attorney-Gen'l Neb.
ENOCH TOTTEN,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

October Term 1885.

MATHIAS SIMMERMAN, *Plaintiff in Error*,
vs.
THE STATE OF NEBRASKA.
} No. 931.

AFFIDAVITS, ETC., IN SUPPORT OF MOTION TO DISMISS.

Affidavit of P. F. H. Shars.

STATE OF NEBRASKA, } *ss.*
Lancaster County. }

P. F. H. Schars being first duly sworn according to law, deposes and says: That he is now, and has been for nearly two years, the duly elected and acting sheriff of the County of Buffalo, in the State of Nebraska, and by virtue of his said office of sheriff, and under the laws of the State of Nebraska, he is the jailor of said Buffalo County.

That on the 26th day of October, A. D. 1883, one Mathias Simmerman was duly indicted and convicted in the District Court of Kearney County, Nebraska, of the crime of murder in the first degree and sentenced to be hanged, and such proceedings were had therein that the said Ma-

thias Simmerman prosecuted a petition in error in said case, in the Supreme Court of the State of Nebraska, and on the 18th day of November, A. D. 1884, the said judgment and sentence of said District Court of Kearney County was in all things by the said Supreme Court duly affirmed, and the said Mathias Simmerman was, on said 18th day of November, 1884, again sentenced by the said Supreme Court to be hanged on the 17th day of April, A. D. 1885, and such proceedings were afterward had that on the 3d day of March, A. D. 1885, a writ of error to the Supreme Court of Nebraska was duly allowed by his honor, Judge MILLER, one of the Judges of the Supreme Court of the United States, commanding said Supreme Court of Nebraska to stay their said proceedings and return a transcript of their said proceedings in said case to the Supreme Court of the United States on or before the 1st day of the next October, A. D. 1885, term thereof.

That afterwards, to wit, on the 7th day of September, a duly certified copy of all the proceedings in said case was by the State of Nebraska duly filed in the said Supreme Court of the United States, and docketed number 931, October Term, and that the said case of *Mathias Simmerman* vs. *The State of Nebraska* is now pending in the said Supreme Court as No. 931, and wholly undetermined; and affiant further says: That on the 10th day of January, A. D. 1884, while affiant was the sheriff and jailor of said Buffalo County, the said Mathias Simmerman was, by the duly constituted authorities of Kearney County, Nebraska, placed in the custody of affiant as such jailor for safe keeping and security, and afterwards, on the 25th day of September, A. D. 1885, while he had the care and custody of said Simmerman for safe keeping, he was duly served with a writ of *habeas corpus* by one A. G. Hastings, a Deputy United States Marshal for the District of Nebraska, issued out of the court of the United States Circuit Court, Commissioner

at Kearney, in said Buffalo County, commanding affiant to forthwith bring the body of said Mathias Simmerman before the said U. S. Commissioner, J. W. Saville.

That this affiant being unacquainted with the laws of the United States and the jurisdiction of United States Commissioner, and under the advice of one L. C. Burr, a practicing attorney in the United States Courts, he was led to believe that the proceedings were legal, and in accordance with the said writ of *habeas corpus* as aforesaid, he, this affiant, did produce the body of said Mathias Simmerman forthwith before the said J. M. Saville, U. S. Commissioner as aforesaid.

A true copy of said order and return is hereto attached and filed herewith, and marked "*A*" & "*A A*". That such proceedings were had in said *habeas corpus* proceedings; that the said U. S. Commissioner, J. M. Saville, released said Mathias Simmerman from the authorities of the State of Nebraska on bail. A copy of the said order releasing said Simmerman is hereto attached and filed herewith, and marked "*B*." A copy of the bond so taken as aforesaid, is hereto attached and filed herewith, and marked "*C*." The copy attached hereto, marked "*D*," is the order allowing the writ of *habeas corpus* by said J. M. Saville; and the copy marked "*E*" is a copy of the application of said Simmerman filed before said J. M. Saville for a writ of *habeas corpus*. And your affiant further says that during all of said proceedings, there was no evidence of any kind introduced on such hearing, but that said commissioner was induced to believe by the said L. C. Burr, the said attorney for Simmerman, that he, the said J. M. Saville, as such United States Commissioner, had full jurisdiction to have and determine such *habeas corpus* proceedings.

And affiant says further that the said Mathias Simmerman, was, on the same 25th day of September, A. D. 1885,

released on bail as aforesaid, and immediately left for parts unknown, and is now at large.

P. F. H. SCHARS.

Subscribed and sworn to before me this 15th day of October, A. D. 1885.

[SEAL.] E. P. ROGGEN,
Secretary of State.
G. P. WINTERSTEEN,
Deputy.

"A."

Writ of Habeas Corpus.

THE UNITED STATES OF AMERICA:

STATE OF NEBRASKA, } *ss.*
Buffalo County. }

To P. F. H. SCHARS:

You are hereby commanded to have the body of Mathias Simmerman, by you unlawfully deprived of his liberty, as is alleged, together with the cause of his detention, before me, J. M. Saville, Commissioner and Examiner of the Circuit Court of the United States for the District of Nebraska, at my office, in the city of Kearney, Buffalo County, Nebraska, on the day of August, A. D. 1885, and nine o'clock in the forenoon of said day, then and there to be dealt with according to law, and have you then and there this writ.

Witness my hand this 25th day of September, 1885.

J. M. SAVILLE,
Commissioner and Examiner of the United States Circuit Court for the District of Nebraska.

DISTRICT OF NEBRASKA } *ss.*

I hereby certify and return that I received the within writ this 25th day of September, A. D. 1885, and I served the same upon the within named P. F. H. Schars at Kearney, Buffalo County, Nebraska, by reading the same to him and in his hearing, and delivering to, and leaving with him, a duly certified copy thereof.

ELLIS L. BIERBOWER,
U. S. Marshal, Dist. of Neb.
By A. G. HASTINGS,
Deputy.

"B"

Order Admitting to Bail.

In the matter of the application of Mathias Simmerman for a writ of *habeas corpus*.

Now, on this 25th day of September, 1885, came P. F. H. Schars, and produced the body of Mathias Simmerman, petitioner herein, and also made return and answer to the writ of *habeas corpus* issued in this case, and after examining the warrant of commitment, and hearing the proofs, I find that the prisoner is unlawfully imprisoned. I also find that the offense with which he stands charged is bailable. It is therefore ordered that the said Mathias Simmerman, be permitted to enter into recognizance in the sum of five thousand dollars ($5,000) with approved sureties, conditioned for his appearance at the next term of the District Court of the United States for the District of Nebraska, and to abide the order and judgment of the Court, and not to depart therefrom without leave, and upon entering into

such recognizance, that he be discharged from imprisonment.

J. M. SAVILLE,
U. S. Commissioner and Examiner of the United States Circuit Court of the District of Nebraska.

"C"

In the matter of the application of Mathias Simmerman for a writ of *habeas corpus.*

Be it remembered that on the 25th day of September, 1885, Mathias Simmerman, petitioner, and E. F. Simmerman and —— ——— his sureties, of the County of Buffalo and the State of Nebraska, personally appeared before me, J. M. Saville, Commissioner and Examiner of the Circuit Court of the United States in and for the District of Nebraska, and acknowledged themselves jointly and severally indebted to the United States of America, in the sum of $5,000.00, to be levied of the goods and chattels, lands and tenements, if default is made in the conditions of the following:

The conditions of this recognizance is such, that if the said Mathias Simmerman shall personally appear before the United States District Court at Omaha, Nebraska, on the second Monday in November next, to answer to the charge of murder, and to abide the order and judgment of said District Court, then this recognizance to be void, otherwise to remain in full force and effect.

MATT. SIMMERMAN,
E. F. SIMMERMAN.

Taken and approved before me, the day and year above written.

J. M. SAVILLE,
Commissioner and Examiner of the Circuit Court of the United States, in and for the District of Nebraska.

"D"

Order Directing Writ of Habeas Corpus.

Now, on this 25th day of September, 1885, came the said Mathias Simmerman, by his said attorneys, and presented his petition, duly verified, praying for a writ of *habeas corpus*, and producing to me a copy of his commitment, as well as a certified copy of the record, filed in the Supreme Court of the State of Nebraska, by which said Simmerman is deprived of his liberty, and it being made to appear that said Mathias Simmerman, is unlawfully detained; it is thereupon ordered that a writ of *habeas corpus* be allowed to issue in favor said Mathias Simmerman returnable on the 25th day of September, 1885, and be directed to said P. F. H. Schars.

J. M. SAVILLE,
U. S. Commissioner.

"E"

Petition for Habeas Corpus.

In the matter of the application of Mathias Simmerman for a writ of *habeas corpus.*

Your petitioner, Mathias Simmerman, respectfully represents unto your honor, J. H. Saville, an Examiner and Commissioner of the Circuit Court of the United States for the District of Nebraska, that he is unlawfully deprived of his liberty by P. F. H. Schars, in the county of Buffalo and State of Nebraska, out of the following facts: On October 16th, 1882, this petitioner was indicted for murder in the first degree for the shooting of Jack Woods in the county of Kearney and State of Nebraska, and has been tried twice

to a jury, and each time been convicted of murder in the first degree; and from the final judgment in the Supreme Court of the State of Nebraska, your petitioner has prosecuted an appeal to the Supreme Court of the United States; that it appears from the files of record herewith submitted, that the said Jack Woods was attempting to deprive the said petitioner of his liberty without due process of law, and that the said pretended arrest of your petitioner out of which, and at which time and place, the said Jack Woods was killed, as well as the laws of the State of Nebraska, to wit: Section 284 of the Criminal Code of the State of Nebraska, and the alleged verdict of the jury and the judgment of the said trial court, and the judgment of the Supreme Court of the State of Nebraska, are and were in conflict with, and prohibited by, the fourth, fifth and fourteenth Amendment to the Constitution of the United States; and that the said attempt to arrest your petitioner, without warrant or process of law, as well as the verdicts and the several judgments of the said several courts, and each of them are therefore void, because thereby depriving your petitioner of the right to resist an unlawful attempt to arrest your petitioner, and attempting to compel your petitioner to submit thereto without due process of law.

And your petitioner further represents that the said P. F. H. Schars is now holding your petitioner, and depriving him of his liberty without right or lawful authority, and a copy of the pretended commitment is hereto attached and marked "Exhibit A." Your petitioner therefore prays that a writ of *habeas corpus* may be issued, and that he may be discharged from said unlawful imprisonment, and he will ever pray.

Attorney for Petitioner.

STATE OF NEBRASKA, } ss.
County of Buffalo. }

I, Mathias Simmerman, being first duly sworn, on oath say, that I am the petitioner in the foregoing petition, and that the facts stated in the same are true, as I verily believe.

MATT. SIMMERMAN.

Subscribed in my presence, and sworn to before me, this 25th day of September, A. D. 1885.

W. H. POUND,
Notary Public.

"A A."

Return to Writ.

Before his Honor, J M. SAVILLE, Commissioner and Examiner of the Circuit Court of the United States in and for the District of Nebraska.

In the matter of the application of Mathias Simmerman for a writ of *habeas corpus*.

P. F. H. Schars, for answer and return to said writ, says that the said Mathias Simmerman was, on the 10th day of January, 1884, placed in his custody by virtue of a warrant of commitment, of which the following is a true copy, and that he now holds said Mathias Simmerman by virtue of said warrant. In obedience to the writ of *habeas corpus* issued herein, he now produces the body of said Simmerman before the said Commissioner and Examiner to be dealt with according to law.

P. F. H. SCHARS,
Sheriff of Buffalo Co.

Kearney, Nebraska, September 25, 1885.

Death Warrant.

THE STATE OF NEBRASKA, } ss.
Kearney County. }

The State of Nebraska to the Sheriff of Kearney County, Greeting:

Whereas, Mathias Simmerman, indicted by the name of John Doe for murder in the first degree, was, at the regular October term of the District Court holden in and for Kearney County, Nebraska, to wit: October 25th, A.D. 1883, duly tried and convicted of the crime of murder in the first degree, sentenced as follows:

Sentence of the Court.

The State of Nebraska *vs.* Mathias Simmerman, indicted by the name of John Doe.

Indicted for murder in the first degree.

On this day came the said Mathias Simmerman in his own proper person before the court attended by his counsel, and being informed by the court of the verdict of the jury, and being asked by the court whether he had anything to say why judgment should not be pronounced against him, responded he had nothing to say.

It is therefore considered and adjudged by the court that the said Mathias Simmerman be taken hence and confined in the county jail of Kearney County, Nebraska, until February fourth, 1884, and that on the said fourth day of February, 1884, he, the said Mathias Simmerman, be taken hence, and between the hour of twelve M. and one P. M. of said fourth day of February, 1884, he, the said Mathias Simmerman be hung by the neck until he is dead.

These are, therefore, to command you to proceed at the time and place named in the above and foregoing sentence

to carry the same into execution by causing the person so convicted and sentenced to be hanged by the neck until dead.

In testimony whereof, I have hereunto set my hand and the seal of this court said 25th day of October, A. D. 1883.

[SEAL.] J. H. JENSEN,
Clerk of Court.

[redacted]

[redacted]

[redacted] Court of the [redacted]

OCTOBER TERM, [redacted]

MATHIAS SIMMERMAN,

[redacted]

vs.

THE STATE OF NEBRASKA,

[redacted]

[redacted] OF PLAINTIFF IN [redacted]
[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

MATHIAS SIMMERMAN,
Plaintiff in Error.
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS.

May it please the court:

The plaintiff in error was twice before the supreme court of the state of Nebraska (14 Neb., 578, by Judge Lake, who thereafter retired from the bench, and 16 Neb., page 615, by Judge Maxwell). He is without means or friends to employ resident counsel, and counsel who makes this brief is not an attorney of this honorable court, and it is impossible for him to appear at the bar of the court and be admitted to argue this motion, but hoping the court will look at this brief, we submit.

1. It is true that the plaintiff in error has been indicted by a grand jury, tried, and convicted by two jury trials, but for something prior to all of this, is wherein plaintiff in error claims to arrive at a Federal question, necessarily involved in the honest determining of this case.

There is no dispute from this record that "Jack Woods" was attempting to arrest this plaintiff in error without due process of law,

and backed his whole authority for so doing upon a telegram from one Wray. In the resistance of this attempt to arrest, Woods was shot and killed by some one, the evidence being quite conflicting.

The telegram sent to Woods was not introduced in evidence, but all the evidence there is being quite incompetent, shows that no prosecution had been commenced by Wray for the apprehension of plaintiff in error, and the record admits the fact that Woods had no official character in Kearney county, had no reason to suppose that the sender of the telegram had any personal knowledge of the supposed horse stealing, or whether the taking thereof was by plaintiff in error, or whether lawful or unlawful. Such pure hearsay coming in a shape where there is no way to bring out precise information, or lay before some examining magistrate of the law any facts at all, cannot be allowed to justify infractions of personal liberty. The officer must have such facts that he can lay before a magistrate as at least would justify the magistrate in holding the accused for further examination. The law contemplates that a complaint shall be sustained speedily by some witnesses, and it would be contrary to all principle to permit anything else. A larceny in Europe or Asia would furnish as good a ground of procedure as one nearer by, and if such loose hearsay will authorize an arrest, innocent parties have no surety against malice. In our opinion such indefinite and irresponsible information is in itself no authority at all, and an officer acting on it acts at his peril. The law places private liberty at a much higher value than property rights, and a violation of the law by those who are appointed to protect society, deserves no special favor, and fundamental rules of constitutional immunity cannot be relaxed.

2. The opinion in this case (page 126, printed record) is based upon the validity of section 284 of the Criminal Code of Nebraska, which reads as follows:

"Any person not an officer, may, without warrant, arrest any per-
"son if a petit larceny has been committed, and there is reasonable
"grounds to believe the person arrested guilty of the crime, and may
"detain him until a legal warrant can be obtained."

Is this statute constitutional? Is it repugnant to the fourth, fifth, and sixth amendments of the constitution, and that part of the fourteenth amendment to the constitution which declares "nor shall any state deprive any person of life, liberty, and property with due process of law?" In the fourteenth amendment we have an express prohibition upon "any state" to arrest any person without process of law. This statute says a person may be held "until a warrant may be obtained" and by fair implication declares that the "apprehending" without warrant is illegal, and, within the prohibition of the fourteenth amendment to the federal constitution, as well as sections three and seven of article one of the Nebraska Constitution, which are copies of articles four and fourteen of the amendment of the federal constitution. In *Ex parte* Commonwealth of Virginia, 100 U. S., p. 370, it is said: "Nor does it make any difference that such legislation is restrictive of what the state might have done before this constitutional amendment was adopted. The prohibitions of the fourteenth amendment are directed to the states, and they are to a degree restrictions of state power. Such enforcements are no invasion of state sovereignty. No law can be, which the people of the state have, by the constitution of the United States, empowered congress to enact. * * We have said the prohibitions of the fourteenth amendment are addressed to the states. They are: "No state" shall make or enforce a law which shall abridge the privileges or immunities of the citizens of the United States, * * nor deny to any person within its jurisdiction the equal protection of the laws. They have reference to the political body denominated a state, by whatever instruments, or in whatever modes that action may be taken. A state acts by its legislative, its judicial, or by its executive authorities, and it can act in no other way.

The constitutional provision, therefore, must mean no agency of the state, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction, the equal protection of the laws. Whoever by virtue of public position under a state government deprives another of property, life, or liberty, without due process of law, or denies, or takes away the equal protection of the laws,

violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. The state has clothed one of its agents with power to annul or evade it. But the constitutional amendment was ordained for a purpose; it was to secure equal rights to all persons, and to insure to all persons the enjoyments of such rights. Power was given to congress to enforce its provisions by appropriate legislation. Such legislation must act upon the persons, not upon the abstract thing called a state, but upon the persons who are the agents of the state, in the denial of the rights which were intended to be secured. The language used by this honorable court seems to the writer hereof, to cover the situation of Simmerman, when he resisted this attempt to deprive him of his liberty without process or warrant of any kind, in the resistance as shown by this record, Simmerman only did that which he had a constitutional right to do. The rights guaranteed to him by the fourteenth amendment, if not by the other amendments of the federal constitution referred to, are the rights intended to be saved to every American citizen, whether white or colored. In this case Woods was acting in the name and for the state, and was clothed in his own county with state power, and it is claimed with state power at the time he attempted to arrest Simmerman, upon the authority of this telegram. His act was the act of the state, and this act is condemned by these constitutional prohibitions, and in the last opinion in the 16th Nebraska, the state has now annulled, evaded, and set aside the constitutional rights exercised by Simmerman in the defense of his life and liberty from the unwarranted attack made upon him by Woods.

3. It is true that the cases cited by counsel support the proposition to a certain extent, that the fourth, fifth, and sixth amendments to the constitution operate as a limitation upon the general government and not upon the states, but *Ex parte* Commonwealth of Virginia, 100 U. S., p. 730, holds expressly that the language used—"nor shall any state deprive any person of life or liberty, without process of law"—to be an express prohibition upon the powers of the several

states. The fourteenth amendment, as well as the fourth, fifth, and sixth amendments of the federal constitution, were each in full force and effect, and were the supreme law of our land long prior to the admission of Nebraska as a state. Will the court say that coming into the Union with these amendments in full force, and binding upon her as a territory, that she gathered larger or different rights and powers than the general government? In section 14 of the organic act admitting the state into the Union, it is said that the "constitution and the laws of the United States, which are not locally inapplicable, shall have the same force and effect as elsewhere in the United States," and also in the enabling act (section 13) says: "That from and after the admission of the state of Nebraska into the Union in pursuance to this act, the laws of the United States not locally inapplicable shall have the same force and effect within the said state as elsewhere within the United States." The constitution of Nebraska was approved February 9th, 1866, the president's proclamation was issued March 1st, 1866, and the 14th amendment was adopted February 1st, 1865, so that all of the authorities claimed by counsel in support of the motion, are inapplicable to the case. The case of Twichel vs. Commonwealth, 7 Wall., came up from Pennsylvania. Nebraska was admitted into the Union under the express condition that the fourth, fifth, and sixth amendments to the constitution, if they were not locally inapplicable, they should have the same force and effect within the state as elsewhere in the United States, but no such restriction was imposed upon Pennsylvania, nor upon any of the original colonies, nor any of the other states as admitted to the Union prior to the adoption of these several amendments, and whose enabling and organic acts permitted such states to come into the federal government, free from these restrictions and limitations. If we will pause and reflect for a moment, and look at the wide difference between the history of our federal constitution and the time when Pennsylvania and all other states from whence cases came before this honorable court, wherein the court has held that the fourth, fifth, and sixth amendments to the constitution, are only a restriction upon the federal government, then the full force of our effort will present itself more clearly. Nearly one hundred years had gone by when

Nebraska came to the federal government, asking rights as a state. With this demand she (with Kansas) precipitated the rebellion by claiming certain constitutional rights, which the federal government said she could not have, and it was then declared that Nebraska might become a state if she would keep inviolate, and guarantee to its citizens all the rights of the federal constitution, not locally inapplicable. But whether the fourth, fifth, and sixth amendments to the constitution are, or are not, a prohibition upon state authority, it seems almost admitted by counsel's brief that the fourteenth amendment is, and that it controls this case.

The release of the plaintiff in error upon bail, ought not to be a case of dismissal of this action, and in the discretion of the court, even if there was error in admitting to bail, yet that fact ought not to deprive the plaintiff in error of his rights, in carrying on this case to determination hereof on the merits, and at most could only be a matter of abatement.

It is therefore submitted that the court has jurisdiction of this case. (See Malcomson vs. Scott, Sup. Ct. of Mich., opinion filed April 22d, 1885, N. W. R., Vol. 23, No. 2, page 168.)

Cooley's Blackstone, vol. 2, Book IV., star page 270.
2 Stark, page 167.
Ex parte Commonwealth vs. Virginia, 100 U. S., page 370.
Kring vs. Mo., 107 U. S., page 221.
Hurtado vs. California, 110 U. S., pages 516-538.

Moffatt Hahns, Mich. U. S. Supreme Court.
Opinion filed Nov. 23rd 1886.

Respectfully submitted,

L. C. BURR,
For Plaintiff in Error.